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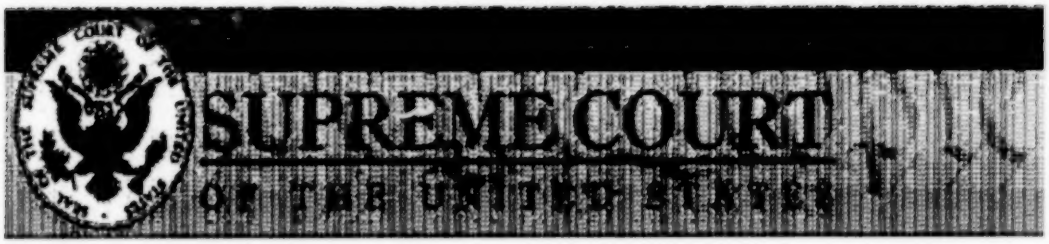

No. 13-435

Title:	Omnicare, Inc., et al., Petitioners
	v.
	Laborers District Council Construction Industry Pension Fund, et al.
Docketed:	October 8, 2013
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(12-5287)
Decision Date:	May 23, 2013
Rehearing Denied:	July 23, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 4 2013	Petition for a writ of certiorari filed. (Response due November 7, 2013)
Nov 4 2013	Waiver of right of respondents Laborers District Council Construction Industry Pension Fund, et al. to respond filed.
Nov 20 2013	DISTRIBUTED for Conference of December 6, 2013.
Nov 21 2013	Response Requested. (Due December 23, 2013)
Dec 16 2013	Order extending time to file response to petition to and including January 9, 2014.
Jan 9 2014	Brief of respondents Laborers District Council Construction Industry Pension Fund, et al. in opposition filed.
Jan 28 2014	Reply of petitioners Omnicare, Inc., et al. filed.
Jan 29 2014	DISTRIBUTED for Conference of February 21, 2014.
Feb 24 2014	DISTRIBUTED for Conference of February 28, 2014.
Mar 3 2014	Petition GRANTED.
Mar 28 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Mar 28 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Mar 31 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 5, 2014.
Mar 31 2014	The time to file respondent's brief on the merits is extended to and including August 25, 2014.
Jun 5 2014	Joint appendix filed. (Statement of costs filed)
Jun 5 2014	Brief of petitioners Omnicare, Inc., et al. filed.
Jun 12 2014	Brief amici curiae of Chamber of Commerce of the United States of America and Business Roundtable filed.
Jun 12 2014	Brief amicus curiae of the United States filed.

Jun 12 2014	Brief amicus curiae of Securities Industry and Financial Markets Association filed.
Jun 12 2014	Brief amicus curiae of Center for Audit Quality filed.
Aug 25 2014	Brief of respondents Laborers District Council Construction Industry Pension Fund, et al. filed.
Aug 28 2014	Brief amicus curiae of Occupy the SEC filed.
Aug 29 2014	Brief amicus curiae of AARP filed.
Aug 29 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 2 2014	Brief amici curiae of Common Law Scholars filed.
Sep 2 2014	Brief amici curiae of Wyoming Retirement System, et al. filed.
Sep 2 2014	Brief amicus curiae of Public Citizen, Inc. filed.
Sep 2 2014	Brief amici curiae of Professors at Law and Business Schools filed.
Sep 2 2014	Brief amici curiae of Institutional Investors filed.
Sep 2 2014	Response of petitioners' to motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument.
Sep 4 2014	SET FOR ARGUMENT on Monday, November 3, 2014.
Sep 8 2014	Record requested from U.S.C.A. for 6th Circuit.
Sep 15 2014	Record received from U.S.C.A. 6th Circuit, this record is electronic.
Sep 16 2014	Record received from U.S.D.C. Eastern District of Kentucky. This record is electronic and located on PACER.
Sep 19 2014	CIRCULATED
Sep 24 2014	Reply of petitioners Omnicare, Inc., et al. filed. (Distributed)
Oct 2 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. The time is to be divided as follows: 30 minutes for the petitioners, 20 minutes for the respondents, and 10 minutes for the Solicitor General.
Nov 3 2014	Argued. For petitioners: Kannon K. Shanmugam, Washington, D. C. For respondents: Thomas C. Goldstein, Bethesda, Md.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Mar 24 2015	Judgment VACATED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Alito, and Sotomayor, JJ., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment. Thomas, J., filed an opinion concurring in the judgment.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

13 - 435

No.

Supreme Court, U.S.
FILED
OCT 4 - 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

OMNICARE, INC., *ET AL.*,
PETITIONERS

v.

THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND AND THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HARVEY KURZWEIL
RICHARD W. REINTHALER
JAMES P. SMITH III
JOHN E. SCHREIBER
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-8768
lcoberly@winston.com

GENE C. SCHAERR
STEFFEN N. JOHNSON
ELIZABETH P. PAPEZ
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, provides a private remedy for a purchaser of securities issued under a registration statement filed with the Securities and Exchange Commission if the registration statement "contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading." Against that statutory backdrop, this case presents the following question:

For purposes of a Section 11 claim, may a plaintiff plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed—as the Second, Third, and Ninth Circuits have held?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Omnicare, Inc. ("Omnicare"), Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, the estate of the late Edward L. Hutton, and Sandra E. Laney.

Respondents are the Laborers District Council Construction Industry Pension Fund and the Cement Masons Local 526 Combined Funds.

In addition to the above-listed parties, Indiana State District Council of Laborers and Hod Carriers Pension Fund was a named plaintiff in the district court but not in the court of appeals.

Pursuant to Supreme Court Rule 29.6, Petitioner Omnicare, Inc. discloses that it does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioners seek this Court's review to resolve a sharp conflict among the circuits over a critical and recurring issue of pleading under the federal securities laws: the standard for pleading falsity in a statement of opinion or belief. This conflict flows from a fundamental disagreement among the circuits about the meaning of this Court's decision in *Virginia Bankshares* v. *Sandberg*, 501 U.S. 1083 (1991).

In *Virginia Bankshares*, this Court considered whether a statement of belief or opinion can be a material misstatement for purposes of a claim under Section 14(a) of the Securities Exchange Act of 1934, or, rather, whether such a statement is *per se* immaterial. The Court concluded that such a statement is actionable only as "a misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. To establish that such a statement was a material misstatement, therefore, the plaintiff must show that the speaker in fact "did not hold the beliefs or opinions expressed." *Id.* at 1090. This requirement is commonly known as "subjective falsity."

The question in the instant case is whether this aspect of *Virginia Bankshares* applies to claims under Section 11 of the Securities Act of 1933. The Second, Third, and Ninth Circuits have all held that it does. In these circuits, no matter which provision of the federal securities laws is at issue, pleading that a statement of opinion was materially untrue requires allegations of both objective *and subjective* falsity. In other words, the plaintiff must allege that the opinion expressed was both wrong *and* inconsistent with the opinion actually held by the speaker.

The Sixth Circuit has taken a contrary position, explicitly rejecting the view of its sister circuits. According to the Sixth Circuit, "[t]he Second and Ninth Circuits have read more into *Virginia Bankshares* than the language of the opinion allows." Pet. App. 18a. Because Section 11 is a strict liability statute and does not require scienter, the Sixth Circuit concluded that the element of falsity for a Section 11 claim must be evaluated without reference to the speaker's subjective mindset, even if the statement was self-evidently a statement of the speaker's own opinion or belief. Thus, in the Sixth Circuit, a plaintiff may state a claim under Section 11 based on an honestly expressed opinion, merely by alleging that the opinion turned out to be wrong.

The Sixth Circuit's approach on this issue threatens dangerous and far-reaching consequences. Among other things, it portends a shift away from the clear limitations this Court and Congress have placed on claims under the federal securities laws. It would expose corporations, auditors, underwriters, and other professionals to a sharp increase in the cost of litigation, as certain types of federal securities claims—particularly those under Section 11—would become far more difficult to resolve at the pleading stage. And it would serve as a powerful disincentive for corporations and their executives to disclose their honestly held opinions on subjects that investors may find important and useful.

This Court's intervention is required to resolve the conflict of authority and ensure fidelity to the limitations this Court recognized more than twenty years ago in *Virginia Bankshares*.

OPINIONS BELOW

The opinion below (Pet. App. 3a–27a) is reported at 719 F.3d 498. The opinion of the district court granting Petitioners' motion to dismiss (Pet. App. 28a–41a) is unreported. An earlier Sixth Circuit opinion in this case (Pet. App. 42a–67a) is reported at 583 F.3d 935.

JURISDICTION

The court of appeals entered judgment on May 23, 2013, and denied a timely petition for rehearing en banc on July 23, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, is set out in the appendix to this petition (Pet. App. 68a–76a).

STATEMENT OF THE CASE

Petitioner Omnicare is the nation's largest provider of pharmaceutical care services for the elderly and other residents of long-term facilities in the United States and Canada. Petitioners Joel Gemunder, David Froesel, Cheryl Hodges, Edward Hutton, and Sandra Laney were officers and directors of Omnicare at the relevant time. Omnicare is a publicly traded company and is subject to a variety of state and federal regulations. Pet. App. 6a.

In December 2005, Omnicare offered 12.8 million shares of common stock for sale pursuant to a registration statement filed with the Securities and Exchange Commission. *Id.* at 6a. Respondents Laborers District Council Construction Industry Pension Fund

and Cement Masons Local 526 Combined Funds allege that they were among the investors in these securities. They purport to represent a class consisting of all investors who purchased securities pursuant to the December 15, 2005 registration statement.

The sole claim at issue in this petition arises under Section 11 of the Securities Act of 1933, which requires a plaintiff to plead and prove that it acquired registered securities issued under a registration statement that "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading." 15 U.S.C. §77k(a), *infra* at Pet. App. 68a. Respondents allege that certain statements in the registration statement were false and misleading—specifically, statements advancing the opinion that Omnicare was in material compliance with applicable laws. Pet. App. 6a–7a.[1] The operative complaint is devoid of any allegations that Omnicare and its officers and directors actually held a different opinion than the one they expressed; indeed, Respondents explicitly disclaimed any such allegations. Pet. App. 10a, 34a n.3.

Petitioners moved to dismiss this claim at the pleading stage. Among other things, Petitioners argued that Respondents had failed to plead that Omnicare's December 2005 registration statement contained any material misstatement or omission. The

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[1] The operative complaint also alleged that the registration statement contained certain other, accounting-based misstatements. The dismissal of that claim was affirmed by the court of appeals (Pet. App. 22a–25a) and is not pertinent to this petition.

district court granted that motion, relying in significant part on a Sixth Circuit decision relating to an earlier version of the complaint in this case. Pet App. 67a ("*Omnicare I*").

In *Omnicare I*, the Sixth Circuit had rejected Respondents' attempt to plead a claim under Section 10(b) of the Securities Exchange Act of 1934 based on statements about Omnicare's legal compliance. The court held that such statements were not actionable without allegations "that defendants actually knew that the 'legal compliance' statements were false when made." *Omnicare I*, 583 F.3d at 945–47, Pet. App. 60a-65a. The reason for this approach, the Sixth Circuit explained, is that statements concerning the "legality" of a company's conduct are considered to be "matters of opinion" and thus constitute "soft" information, which is generally considered immaterial. *Id.* at 947, Pet. App. 60a (citations omitted). For that reason, such statements cannot be deemed material misstatements unless the plaintiff alleges that the speaker was aware at the time that the company was not, in fact, in compliance with the law. *Ibid.* In reaching this decision, the court focused entirely on falsity and materiality and did not consider the separate element of scienter.

On remand, and following a further amendment of the complaint, the district court correctly concluded that Respondents' attempt to plead a Section 11 claim based on substantially identical "legal compliance" statements failed for the same reason. Once again, the operative complaint failed to plead that the "defendants knew the statements were untrue at the time they were made." Pet. App. 38a. According to the district court, allegations about Petitioners' sub-

jective mindset were necessary to show that these statements of opinion were actionable as misstatements of material fact. *Ibid.* Because there were no such allegations, the claim failed as a matter of law.

The Sixth Circuit reversed and remanded this aspect of the district court's decision. Pet. App. 24a–25a. It held that the standard it had articulated in *Omnicare I* with respect to pleading material falsity is limited to claims under Section 10(b) and has no application to claims under Section 11. *Id.* at 15a. Section 11, the court explained, does not require scienter but rather "provide[s] for strict liability." *Ibid.* According to the Sixth Circuit, "a defendant's knowledge is not relevant to a strict liability claim," and thus the element of falsity for purposes of Section 11 must be assessed without any reference to the speaker's subjective mindset. *Id.* at 16a. In other words, once the plaintiff pleads that the opinion itself was objectively wrong, "that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of falsity." *Ibid.*

The Sixth Circuit expressly acknowledged that its holding in this regard conflicts with the Second Circuit's decision in *Fait* v. *Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), and the Ninth Circuit's decision in *Rubke* v. *Capital Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009). Both of those decisions hold that for a statement of belief or opinion, liability under Section 11 lies "only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Fait*, 655 F.3d at 110, cited in Pet. App. 16a; accord *Rubke*, 551 F.3d at 1162, cited in Pet. App. 16a. According to the Sixth Circuit, both *Fait* and *Rubke* "read more into *Virginia*

Bankshares than the language of the opinion allows and have stretched to extend this Section 14(a) case into a Section 11 context." Pet. App. 18a. And to the extent that the language of *Virginia Bankshares* (both majority and concurring opinions) actually supports a subjective falsity requirement, the Sixth Circuit proclaimed that these "musings regarding mens rea are dicta." *Id.* at 19a.

Petitioners sought rehearing en banc, explaining that the court's decision departs from settled authority in other circuits and makes the Sixth Circuit the most lenient jurisdiction in the Nation in terms of pleading Section 11 claims. The full Sixth Circuit declined review.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case reflects a stark conflict among the federal courts of appeals in the standards for pleading "falsity" under the federal securities laws. In the Sixth Circuit, a plaintiff in a Section 11 case may now plead that a statement of opinion was "false" merely by showing that the opinion was objectively wrong, even if the defendant honestly held the expressed opinion at the time. According to that court, even if the statement was self-evidently a statement of opinion, "subjective falsity" is not required.

The Sixth Circuit openly acknowledged that this conclusion places it in conflict with other federal courts of appeals that have addressed this precise issue. Each of these courts has specifically held that a claim under Section 11 requires allegations of both objective *and subjective* falsity. This conflict, standing alone, presents an important question warranting

this Court's attention. And the nature of the issue makes this Court's intervention even more important, as the disagreement among the circuits flows from a basic difference of opinion about the meaning of this Court's decision in *Virginia Bankshares*.

There is no doubt that this case squarely presents the issue and provides an ideal vehicle for resolving it. The Sixth Circuit held that Respondents "pleaded objective falsity." Pet. App. 17a. But Respondents have not pleaded *subjective* falsity; indeed, they have specifically disclaimed any such allegations. See *id.* at 10a. Thus, the resolution of the question presented in this Petition will undeniably control whether this dispute can move past the pleading stage.

For all these reasons—and given the importance of the issue to a variety of participants in the U.S. capital markets—Petitioners urge this Court to grant review.

I. The decision below creates a conflict among the circuits over the standards for pleading falsity in statements of opinion or belief.

As the Sixth Circuit acknowledged, its decision in this case conflicts with decisions of both the Second and Ninth Circuits. Pet. App. 16a–17a (citing and disagreeing with the Second Circuit's decision in *Fait*, 655 F.3d at 110, and the Ninth Circuit's decision in *Rubke*, 551 F.3d at 1162). Indeed, the conflict runs even deeper than that, as the Third Circuit too has reached a result squarely contrary to the decision below. See *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368–69 (3d Cir. 1993). These three circuits have all explicitly held that a claim under Section 11 premised on a statement of opinion or belief requires

allegations of subjective falsity; the Sixth Circuit has held that it does not.

Underlying this conflict is a dispute about the meaning and scope of this Court's decision in *Virginia Bankshares*. The Court there considered the requirements for establishing liability for fraud in a proxy statement. That kind of claim arises under Section 14(a) of the Exchange Act—which, like Section 11 of the Securities Act, requires the plaintiff to plead and prove an "untrue statement of a material fact." 15 U.S.C. § 78n(e). The question before the Court was whether a statement of belief or opinion could *ever* constitute an untrue statement of material fact.

The Court concluded that such a statement may be both material and factual as a representation about "the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. But "[b]ecause such a statement by definition purports to express what is consciously on the speaker's mind," it cannot constitute a material *mis*statement unless the speaker "did not hold the beliefs or opinions expressed." *Id.* at 1090. Accordingly, under *Virginia Bankshares*, establishing a material misstatement of opinion requires both objective *and subjective* falsity.

The Second, Third, and Ninth Circuits have all applied this analysis in the context of claims under Section 11, which provides a private right of action for material misstatements and omissions in publicly filed registration statements. According to the Second Circuit, for example, requiring allegations of subjective falsity for statements of opinion "makes logical sense" because it "ensures that their allegations concern the factual components of those statements"—

namely, the factual assertion that the speaker holds the opinion expressed. *Fait*, 655 F.3d at 110–12.

Similarly, the Ninth Circuit has held that statements of opinion "can give rise to a claim under Section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false and misleading." *Rubke*, 551 F.3d at 1162. And the Third Circuit has held that "statements of 'soft' information may be actionable misrepresentations [under Section 11] [only] if the speaker does not genuinely and reasonably believe them." *Trump*, 7 F.3d at 368–69.

These courts reached this result notwithstanding that a claim under Section 11—unlike certain other federal securities law claims—does not otherwise require scienter. See *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 381–82 (1983) (Section 11 provides for strict liability and does not require allegations or proof about the defendant's state of mind). As the Second Circuit explained, requiring subjective falsity with respect to statements of opinion or belief "does not amount to a requirement of scienter," but rather is simply a function of the nature of the particular misstatement that the plaintiff chose to allege. *Fait*, 655 F.3d at 112 n.5. As the Second Circuit recognized, this conclusion flows from this Court's recognition in *Virginia Bankshares* that "a statement [of opinion or belief] by definition purports to express what is consciously on the speaker's mind." 501 U.S. at 1090, cited in 655 F.3d at 111–12. Without allegations about what belief the speaker actually held, the court cannot determine whether, as a matter of simple logic, the alleged misstatement was false in any material respect.

The Sixth Circuit disagrees, concluding that these other circuits have "read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this Section 14(a) case into a Section 11 context." Pet. App. 18a. The court's reasoning starts with the premise that a claim under Section 14(a)—unlike a claim under Section 11—requires allegations of scienter. *Id.* at 18a, n.3 (citing *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir. 1980)).[2] The court views *Virginia Bankshares* through that lens, concluding that this Court's discussion of "knowledge of falsity" for the Section 14(a) claim must have been an extension of the scienter requirement. Pet. App. 17a–19a.

As the Sixth Circuit explains, the Court in *Virginia Bankshares* had specifically "reserv[ed] the

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[2] Although *Adams* appears to represent the position of the Sixth Circuit on this issue, the weight of authority is to the contrary. See, *e.g.*, *Beck* v. *Dobrowski*, 559 F.3d 680, 681 (7th Cir. 2009) ("There is no required state of mind for a violation of section 14(a)"); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 196 (3d Cir. 2007) ("Violations of Section 14(a) * * * may be committed without scienter; in other words, no culpable intent is required."); *Knollenberg* v. *Harmonic, Inc.*, No. 03-16238, 2005 WL 2980628, at *6 (9th Cir. Nov. 8, 2005) ("[U]nlike Section 10(b), Section 14(a) lacks any reference to a manipulative device or contrivance to indicate a requirement of scienter."). This Court need not reach that issue, however, to resolve the question presented here. The question here has to do with pleading falsity—an "untrue statement of material fact"—which is independent of the element of scienter and is required for *all* misstatement claims under the federal securities laws.

question whether scienter was necessary for liability generally under § 14(a)." *Id.* at 18a (citing 501 U.S. at 1090 n.5). Under the Sixth Circuit's reading, *Virginia Bankshares* "tied the knowledge of falsity requirement to scienter but explicitly declined to address the issue further. Instead, it assumed the jury in the case had already found knowledge of falsity—whether necessary or not—and proceeded from there." *Ibid.* On that basis, the Sixth Circuit concluded that *Virginia Bankshares* is of "very limited application to Section 11," for which scienter is not required. *Ibid.*

The Sixth Circuit specifically addressed Justice Scalia's concurring opinion in *Virginia Bankshares*, which the Second Circuit had considered in requiring subjective falsity even for a claim under Section 11. Justice Scalia wrote:

> As I understand the Court's opinion, the statement "In the opinion of the Directors, this is a high value for the shares" would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise. * * * I agree with all of this.

501 U.S. at 1108–09. As the Second Circuit has recognized, this discussion underscores the conclusion that a statement of opinion *cannot constitute a material misstatement* unless the speaker's actual opinion was different from the one expressed. See *Fait*, 655 F.3d at 111.

The Sixth Circuit rejected that reading. Because the majority in *Virginia Bankshares* chose not to re-

solve the question whether Section 14(a) requires scienter, the Sixth Circuit declined to credit any "musings" about "knowledge of falsity" by either the majority or the concurrence. *Ibid.* The court continued:

> While there are contexts in which dicta provides valuable insight into the Court's outlook, we must be careful in how it is extended and applied. This is a context in which extension of dicta is most dangerous. Even Justice Scalia's seemingly direct statement must be read in the context of § 14(a)—a non-strict liability statute. In writing the opinion, the Court could not have intended that musings regarding the requirement would later be applied to an unrelated statute. We therefore refuse to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon Section 11 claims.

Ibid.

Given how explicitly the Sixth Circuit rejected its sister circuits' conclusions—both about the subjective falsity requirement and about *Virginia Bankshares* itself—there is no realistic possibility that the split of authority will be resolved on its own. The Sixth Circuit reached its decision fully aware that its position was inconsistent with that of the other circuits to address the issue. It has since declined the opportunity to hear the issue en banc. The passage of time will simply amplify the existing conflict and cause further confusion in the federal courts on this important issue. Petitioners urge this Court to grant review and resolve this issue now.

II. The Sixth Circuit's approach could have grave and far-reaching implications.

The Sixth Circuit's decision has already been the subject of significant controversy. Dozens of articles, blog posts, and commentaries have discussed its implications. See, *e.g.*, Alison Frankel, "The 6th Circuit splits with 2nd and 9th, lowers bar for securities claims" (May 24, 2013), retrieved Sept. 27, 2013 from http://blogs.reuters.com/us/; Rodney F. Tonkovic, "Knowledge of Wrongdoing Not Required for Section 11 Claims," SEC. REG. DAILY (May 28, 2013), retrieved Sept. 27, 2013 from www.dailyreportingsuite.com; Stewart Bishop, "6th Circuit Takes Wide View of Liability In Stock Inflation Suits," LAW360 (May 23, 2013), retrieved Sept. 27, 2013 from http://www.law360.com/articles/; Phyllis Skupien, "6th Circuit ruling in Omnicare shareholder suit creates circuit split," THE KNOWLEDGE EFFECT (June 20, 2013), retrieved Sept. 27, 2013 from http://blog.thomsonreuters.com/.[3]

The controversy is no surprise, given the importance of the federal pleading standards to all of the professionals and corporations that play a role in

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[3] See also, *e.g.*, Claire Loebs Davis, "6th Circuit Took A Wrong Turn In Omnicare Case," LAW360 (Aug. 21, 2013), retrieved Sept. 27, 2013 from http://www.law360.com/articles/; Paul Dutka, "Defending 1933 Act Claims: Rewriting The Playbook After *Fait v. Regions Fin. Corp.*," BLOOMBERG LAW NEWS (Aug. 27, 2013), retrieved Sept. 27, 2013 from http://about.bloomberglaw.com/; Harvard Law School Forum on Corp. Gov. & Fin. Reg., "The Circuits Split on Securities Act Pleading Standards" (May 31, 2013), *available at* http://blogs.law.harvard.edu/.

securities offerings. A claim under Section 11 imposes strict liability and thus carries unique risks and costs. Under the Sixth Circuit's approach, many potential speakers—including issuers, officers, directors, auditors, lawyers, and underwriters—may find themselves vulnerable to claims based on hindsight, as potential plaintiffs and class counsel focus their efforts on statements of opinion that, over time, turn out to be wrong.

While Section 11 does permit a "due diligence" or "good faith" defense, such a defense is available only to certain kinds of speakers for certain kinds of statements and is generally difficult to invoke at the pleading stage. See 15 U.S.C. § 77k(b)(3). Without any requirement that the plaintiff allege subjective falsity with respect to statements of opinion or belief, defendants may find it impossible to resolve those claims through a motion to dismiss—and, indeed, may ultimately bear strict liability—even if the opinion or belief they expressed actually reflected their honestly held views at the time.

The mere filing of such cases imposes significant costs on all these market participants and, in turn, on the U.S. capital markets as a whole. As this Court has observed, "the mere existence of an unresolved lawsuit" in this kind of class action litigation "has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723,

742–43 (1975). "Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." S. Rep. No. 109-14, at 20–21 (2005), reprinted in 2005 USCCAN 3, 21.

Further, the Sixth Circuit's approach will serve as a powerful disincentive for issuers and others associated with registration statements to share their opinions on a variety of topics that may be important to investors—opinions that may well turn out to be both valuable and well-founded. Cf. *Hubbard* v. *United States*, 514 U.S. 695, 701 (1995) (Scalia, J., concurring in part and concurring in the judgment) (warning that applying 18 U.S.C. § 1001 to allegedly false statements made in federal court could have a chilling effect on legitimate trial advocacy).

Here, for example, the opinions at issue concern compliance with certain legal requirements. Respondents did not allege (and have never shown) that either Omnicare or its officers or directors held a different belief at the time of the registration statement than the one they actually expressed; indeed, Respondents expressly disclaimed any such allegations. Pet. App. 10a. Any reader of the registration statement would have understood that these legal compliance statements represented the viewpoint of the speaker and were not a guarantee of compliance. The Sixth Circuit's approach, however, transforms these statements of opinion into just such a guarantee. The existence of this precedent—whether followed in only one federal circuit or more—will undoubtedly have a

negative impact on the willingness of issuers and others to disclose their opinions on any topic where such disclosure is not specifically required.

Indeed, a relaxed standard for pleading falsity could have implications for all sorts of federal securities claims, whether under provisions like Section 11 (which provides for strict liability) or under Section 10(b) (which does not). Most claims for liability under the federal securities laws require either a material omission or an "untrue statement of a material fact."[4] Until now, courts have interpreted the analysis in *Virginia Bankshares* to apply to the element of falsity regardless of what sort of claim is at issue. See, *e.g.*, *Fait*, 655 F.3d at 111 (claims under Sections 11 and 12); *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 47 (1st Cir. 2005) (in a Section 10(b) case, citing *Virginia Bankshares* and requiring "subjective falsity", independent of any scienter requirement); *Nolte* v. *Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) (in the context of a Section 10(b) case, holding that "[i]n order to plead that an opinion is a false factual statement under *Virginia Bankshares*, the complaint must allege that the opinion expressed was dif-

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[4] Rule 10b-5, 17 C.F.R. 240.10b-5 (liability for "any untrue statement of a material fact"); 15 U.S.C. § 77k(a) (Section 11 of the Securities Act: liability for registration statements containing "an untrue statement of a material fact"); 15 U.S.C. § 77l(a)(2) (Section 12(a)(2) of the Securities Act: liability for prospectus containing "an untrue statement of a material fact"); 15 U.S.C. § 78n(e) (Section 14(a) of the Exchange Act: liability for proxy statements containing "an untrue statement of a material fact"); accord 15 U.S.C. § 77r (Section 18 of Exchange Act: liability where statement was "false or misleading with respect to any material fact").

ferent from the opinion actually held by the speaker."). If allowed to stand, the Sixth Circuit's suggestion that the element of falsity may differ from claim to claim—depending on what other elements are required—could throw this entire area of law into disarray. For this reason too, this Court's intervention is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HARVEY KURZWEIL
RICHARD W. REINTHALER
JAMES P. SMITH III
JOHN E. SCHREIBER
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-8768
lcoberly@winston.com

GENE C. SCHAERR
STEFFEN N. JOHNSON
ELIZABETH F. PAPEZ
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000

OCTOBER 2013

APPENDIX

APPENDIX A

No: 12-5287

United States Court of Appeals
for the Sixth Circuit

FILED
Jul 23, 2013
DEBORAH S. HUNT, Clerk

INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

CEMENT MASONS LOCAL 526 COMBINED FUNDS; LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND,

Plaintiffs-Appellants,

v.

ORDER

OMNICARE, INC.; JOEL F. GEMUNDER; DAVID W. FROESEL, JR.; CHERYL D. HODGES; EDWARD L. HUTTON; SANDRA E. LANEY,

Defendants-Appellees.

BEFORE: COLE and GRIFFIN, Circuit Judges; and GWIN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

* Hon. James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 13a0145p.06

United States Court of Appeals
for the Sixth Circuit

INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, on behalf of itself and all others similarly situated, No. 12-5287

Plaintiff;

CEMENT MASONS LOCAL 526 COMBINED FUNDS; LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND,

Plaintiffs-Appellants,

v.

OMNICARE, INC.; JOEL F. GEMUNDER; DAVID W. FROESEL, JR.; CHERYL D. HODGES; EDWARD L. HUTTON; SANDRA E. LANEY,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky at Covington.
No. 2:06-cv-26—William O. Bertelsman, District Judge

Argued: January 15, 2013

Decided and Filed: May 23, 2013

Before: COLE and GRIFFIN, Circuit Judges; GWTN, District Judge.*

COUNSEL

ARGUED: Eric Alan Isaacson, ROBBINS GELLER RUDMAN & DOWD LLP, San Diego, California, for Appellants. Harvey Kurzweil, WINSTON & STRAWN LLP, New York, New York, for Appellees. ON BRIEF: Eric Alan Isaacson, Henry Rosen, Jennifer L. Gmitro, Amanda M. Frame, ROBBINS GELLERRUDMAN & DOWD LLP, San Diego, California, for Appellants. Harvey Kurzweil, Richard W. Reinthaler, John E. Schreiber, WINSTON & STRAWN LLP, New York, New York, Wm. T. Robinson III, Michael E. Nitardy, FROST BROWN TODD LLC, Florence, Kentucky, for Appellees.

COLE, J., delivered the opinion of the court in which GRIFFIN, J., and GWIN, D. J., joined. GWIN, J. (pp. 18-19), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge. Plaintiffs, all Omnicare investors, appeal the dismissal of their securities suit

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k (2010), against Defendants Ornnicare, Inc., its officers, and directors. Plaintiffs allege that Defendants made material misstatements and/or omissions in a Registration Statement filed with the Securities and Exchange Commission in connection with a December 2005 public stock offering. The district court held that Plaintiffs had not adequately pleaded knowledge of wrongdoing on the part of Defendants and dismissed the complaint for failure to state a claim upon which relief can be granted. Plaintiffs seek reversal of the district court's dismissal order on the grounds that § 11 is a strict liability provision. For the following reasons, we REVERSE and REMAND in part and AFFIRM in part.

I.

Defendant Omnicare is the nation's largest provider of pharmaceutical care services for the elderly and other residents of long-term care facilities in the *United States and Canada. Ind. State Dist. Council v. Omnicare Inc.*, 583 F.3d 935, 938 (6th Cir. 2009) (hereinafter "*Omnicare I*"); *Ind. State Dist. Council v. Omnicare Inc.*, 527 F. Supp. 2d 698, 700-01 E.D.(E.D.Ky. 2007). During the relevant time period, Defendant Joel Gemunder was Omnicare's Chief Executive Officer; Defendant David Froesel was Omnicare's Chief Financial Officer and a Senior Vice President; Defendant Cheryl Hodges was Omnicare's Secretary and a Senior Vice President; Defendant Edward Hutton was Chairman of the Board of Directors;[1] and Defendant Sandra Laney was a Director.

[1] According to Defendants, Mr. Hutton is deceased.

Plaintiffs are investors who purchased Omnicare securities in a December 15, 2005, public offering. In conjunction with the public offering, Omnicare offered 12.8 million shares of common stock and made related filings with the Securities and Exchange Commission. These filings were incorporated into a Registration Statement which is central to the current litigation. Plaintiffs did not hold the stock long. They sold all of these securities by January 31, 2006.

Plaintiffs seek relief under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k. Section 11 provides a remedy for investors who have acquired securities under a registration statement that was materially misleading or omitted material information. It imposes liability on issuers and signers of registration statements containing untrue statements or omissions of material fact. 15 U.S.C. § 77k(a). Section 11 also imposes liability on the directors of the issuer. *Id.* at § 77k(a)(2).

According to the Third Amended Complaint[2], Omnicare was engaged in a variety of illegal activities including kickback arrangements with pharmaceutical manufacturers and submission of false claims to Medicare and Medicaid. Plaintiffs allege that representations in the Registration Statement were material, untrue and misleading because they effectively concealed Omnicare's illegal activities from its investors. According to the Plaintiffs, the Registration Statement stated "that [Omnicare's]

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[2] Although the Third Amended Complaint is titled "Second Amended Consolidated Complaint," it is the third amendment to the original complaint in this litigation. The parties and the district court have consistently referred to it as the "Third Amended Complaint."

therapeutic interchanges were meant to provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed" and that its contracts with drug companies were "*legally and economically valid* arrangements that bring value to the healthcare system and patients that we serve." Plaintiffs claim that given Omnicare's alleged illegal activities, these and other statements indicating compliance with the law were misleading. Specifically, Plaintiffs allege that these statements of "legal compliance" made in the Registration Statement were material, false and misleading, and therefore in violation of § 11.

Furthermore, Plaintiffs allege that Omnicare failed to comply with Generally Accepted Accounting Principles ("GAAP"), such that the financial statements filed in connection with the December 2005 public offering substantially overstated the company's revenue. Therefore, according to Plaintiffs, the financial statements contained material misstatements and omissions in violation of § 11.

Plaintiffs filed this case in the United States District Court for the Eastern District of Kentucky in February 2006 as a putative securities class action, alleging claims for violations of § 10(b), Rule 10b-5 and § 20(a) of the Securities and Exchange Act of 1934. *Omnicare I*, 583 F.3d at 939. A class was never certified. Plaintiffs later amended the complaint, adding a claim under § 11 for material misstatements and omissions in the Registration Statement. That § 11 claim is the basis of the instant appeal.

Defendants moved to dismiss the complaint on a variety of grounds. On October 12, 2007, the district court granted Defendants' motion and dismissed the

complaint in its entirety. *Omnicare*, 527 F. Supp. 2d at 712. With respect to the § 10(b), Rule 10b-5 and § 11 claims, the district court determined that Plaintiffs had failed to plead loss causation—the causal connection between a defendant's misconduct and the plaintiffs loss. *Id.* at 704-05. The claim made under § 20(a) was dismissed as well. *Id.* at 711. Plaintiffs appealed.

On October 21, 2009, this Court affirmed the judgment of the district court with respect to all claims except the § 11 claim. We held that "loss causation" is not an element of a § 11 claim but is instead an affirmative defense. *Omnicare I*, 583 F.3d at 947. Accordingly, we determined that the district court had erred by requiring Plaintiffs to plead loss causation in order to state their § 11 claim. We remanded the case to district court for further analysis. *Id.* at 948.

Plaintiffs pursued a writ for certiorari, which they later dismissed, and then moved for leave to amend the complaint in order to re-plead the § 11 claim. The motion was granted. The Third Amended Complaint encompasses two types of § 11 allegations: (1) material misstatements and omissions made with reference to the statements or legal compliance"; and (2) material misstatements and omissions in reference to GAAP. Defendants filed a motion to dismiss the Third Amended Complaint.

On February 13, 2012, the district court granted Defendants' motion, concluding that because the Plaintiffs' § 11 claim "sounds in fraud," it was subject to but failed to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). The court furthermore held that, for both claims asserted under

§ 11, Plaintiffs were required, but failed to plead, knowledge of falsity on the part of the Defendants. Because the court found that the complaint failed to satisfy the pleading standards of Rule 9(b), and because Plaintiffs had not sufficiently pleaded Defendants' knowledge of falsity, the complaint was dismissed. Plaintiffs again appealed.

II.

Whether the district court properly dismissed a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is a question of law subject to de novo review. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). The court must construe the complaint in a light most favorable to the plaintiff and accept all factual allegations as true. *Id.* at 688. The factual allegations must "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Stated otherwise, the Rule 12(b)(6) standard requires that the plaintiff provide "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A complaint must "contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005).

While notice pleading requirements are based on Rule 8, *see Twombly*, 550 U.S. at 555, claims for fraud are held to the heightened pleading standard of Rule 9(b). We held in *Omnicare I* that, although § 11 claims do not require pleading of scienter, Rule 9(b) pleading standards still apply to § 11 claims that sound in fraud. *Omnicare I*, 583 F.3d at 948. We furthermore held that the § 11 claims pleaded by Plaintiffs in the instant case met this requirement. *Id.*

Plaintiffs argue that, since this Court's decision in *Omnicare I*, they have amended their complaint to abandon all claims "that could be construed as alleging fraud or intentional or reckless misconduct" and that, as a result, Rule 9(b) no longer applies. They base this argument primarily on a disclaimer that has been added to the complaint stating: "Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on the theories of strict liability and negligence under the Securities Act." This one-sentence disclaimer, however, does not achieve Plaintiffs' desired result. *See Cal. Pub. Emps. Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160 (3rd Cir. 2004) ("[A]n examination of the factual allegations that support Plaintiffs' section 11 claims establishes that the claims are indisputably immersed in . .. fraud. The one-sentence disavowment of fraud contained [in] . . . the . . . [c]omplaint does not require us to infer" otherwise) (footnote omitted). The basis of Plaintiffs' allegations has not changed since *Omnicare I*, and therefore the heightened pleading standard of Rule 9(b) still applies to the § 11 claims.

Complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). In order to meet the "particularity" requirement of Rule 9(b), "a plaintiff [must] allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (internal quotation marks and citation omitted); see also *Omnicare I*, 583 F.3d at 942-

43. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

Plaintiffs have brought two separate § 11 claims in their Third Amended Complaint: one for material misstatements and/or omissions of legal compliance and one for Defendants' alleged failure to comply with GAAP such that the Registration Statement contained material misstatements and/or omissions. We address each of these claims in turn.

A.

1.

Plaintiffs allege that Omnicare's statements of legal compliance led investors to believe that Omnicare—which was allegedly engaged in illegal activities—was in compliance with the law. Plaintiffs assert that these statements of legal compliance made in the Registration Statement were therefore material, untrue, and misleading, in violation of § 11.

The district court held that Plaintiffs were required to plead that Defendants knew that the statements of legal compliance were false at the time they were made. Because the court found that Plaintiffs failed to plead knowledge of falsity, it dismissed the complaint for failure to state a claim. On appeal, Plaintiffs argue that § 11 provides for strict liability and it was therefore inappropriate for the district court to require them to plead knowledge in connection with their § 11 claim. We agree.

Section 11 provides for the imposition of liability if a registration statement, as of its effective date, "contained an untrue statement of a material fact or

omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). It provides a remedy for investors who have acquired securities pursuant to a registration statement that was materially misleading or omitted material information. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). Section 11 provides for strict liability, and does not require a plaintiff to plead a defendant's state of mind. *See id.* at 382. Plaintiffs contend that the argument should end here and that the district court erred by requiring them to plead state of mind.

Defendants respond, however, that the issue is not so simple. Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, have elements parallel to § 11, prohibiting "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security." *Miller v. Champion Enters. Inc.*, 346 F.3d 660, 671 (6th Cir. 2003) (internal quotation marks and citation omitted). This Court held in *Omnicare I*—for purposes of § 10(b) and Rule 10b-5—that legal compliance statements are "soft information." *See Omnicare I*, 583 F.3d at 945 (citation omitted). Soft information includes matters of opinion and predictions. There is no duty to disclose soft information unless it is "virtually as certain as hard facts." *In re Sofamor Danek Grp. Inc.*, 123 F.3d 394, 401-02 (6th Cir. 1997) (internal quotation marks and citations omitted). Because there is generally no duty to disclose soft information for purposes of § 10(b) and Rule 10b-5, a defendant corporation that chooses to keep completely silent regarding soft information cannot be held liable for a material omission under those provisions. *See id.*

A thornier issue arises when a defendant chooses to disclose some soft information, as occurred in the instant case. Defendants were not completely silent, but instead spoke on issues of legal compliance. With regard to § 10(b) and Rule 10b-5, this Court has reasoned:

> [T]he protections for soft information end where speech begins . . . .: [H]ow can a rule of non-disclosure apply to a company's disclosure? If—as defendants contend—the protection for soft information remains intact even after a company speaks on an emerging issue, the speaker could choose which contingencies to expose and which to conceal. On any subject falling short of reasonable certainty, then, a company could offer a patchwork of honesty and omission. This proposition is untenable . . . .

Helwig v. Vencor, Inc., 251 F.3d 540, 560 (6th Cir. 2001) (en banc), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

In *Omnicare I*, this Court addressed Plaintiffs' § 10(b) and Rule 10b-5 claims regarding statements of legal compliance. The Court reasoned, citing *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 831 (8th Cir. 2003), and *Helwig*, that Plaintiffs could not stop at pleading that Defendants' disclosures were untruthful. *See Omnicare I*, 583 F.3d at 945. We held that in order for § 10(b) and Rule 10b-5 liability to attach to Omnicare's general assertions of legal compliance, the complaint must "adequately plead[] that the defendants knew the statements were untruthful" at

the time they were made. *Id.* at 945 (internal quotation marks and citation omitted). The *Omnicare I* panel found that Plaintiffs had not adequately pleaded any allegation that Defendants knew that the legal compliance statements were false when made and accordingly held that Plaintiffs had failed to state a claim. *Id.* at 946-47.

The *Omnicare I* panel relied heavily on *Kushner*, which had in turn relied heavily on our *Helwig and Sofamor* opinions. *See Omnicare I*, 583 F.3d at 945 (citing *Kushner*, 317 F.3d at 831.). *Kushner* frames the knowledge of falsity pleading requirement as one of disclosure. *Kushner* does not appear to have distinguished between material misstatements and omissions under § 10b and Rule 10b-5. Although the primary issue in *Kushner* was whether defendants were liable for a material misstatement, the court began by commenting: "Before liability for non-disclosure can attach, the defendant must have violated an affirmative duty of disclosure." *Kushner*, 317 F.3d at 831 (internal quotation marks and citation omitted). Citing Sofamor, the court noted that there is generally no duty to disclose soft information. When knowledge of falsity is shown, however, "[o]pinions cease to be soft information" and become hard facts. *Id.* At that point, the duty to disclose and liability for disclosure of false information under § 10b and Rule I Ob-5 attach. See id. Although the court agreed that "even absent a duty to speak, a party who voluntarily discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully," it held that "[a]bsent a clear allegation that the defendants knew of the scheme and its illegal nature at the time they stated the belief that the company was in compliance with the law, there [was] nothing further to

disclose." *Id.* (internal quotation marks and citation omitted). According to Kushner, under § 10b and Rule 10b-5 a defendant may only be liable for a material misstatement if she knew the statements were false and therefore knew there was something further to disclose.

Language in *Helwig* supports the view taken by the Eighth Circuit in Kushner for purposes of § 10b and Rule 10b-5. In *Helwig*, this Court stated: "With regard to future events, uncertain figures, and other so-called soft information, a company may choose silence or speech elaborated by the factual basis *as then known* . . ." 251 F.3d at 561 (emphasis added). In other words, a company that chooses to disclose soft information assumes the duty to do so fully and truthfully, but only to the extent that facts are known at the time the statements are made. *Helwig, Kushner and Omnicare I*, therefore appear to indicate that, in § 10(b) and Rule 10b-5 cases, a plaintiff must plead knowledge of falsity because there can be no liability for a material misstatement if a defendant was not aware there was anything further to disclose in order to correct the misstatement.

Defendants now argue that the same reasoning should apply under § 11 to the case at hand. We do not agree. Section 10(b) and Rule 10b-5 require a plaintiff to prove scienter, § 11 is a strict liability statute. It makes sense that a defendant cannot be liable for a fraudulent misstatement or omission under § 10(b) and Rule 10b-5 if he did not know a statement was false at the time it was made. The statement cannot be fraudulent if the defendant did not know it was false. Section § 11, however, provides for strict liability when a registration statement "contain [s] an untrue statement of a material fact." 15 U.S.C.

77k(a); *see Huddleston*, 459 U.S. at 382. No matter the framing, once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim.

It is immaterial that this issue has been framed as a disclosure requirement. Disclosed information can nevertheless be indisputably wrong. Under the language of § 10(b) and Rule 10b-5, a defendant may take shelter in the fact that she did not know there was anything further to disclose; it was not, audulent for the defendant to fail to disclose anything further. A plaintiff therefore fails to state a claim if she has not pleaded knowledge of falsity. Under § 11, however, if the defendant discloses information that includes a material misstatement, that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of falsity.

Finally, Defendants urge us to follow *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011). In Fait, a case similar to the instant one, the Second Circuit held "when a plaintiff asserts a claim under section 11 . . . based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Id.* at 110 (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991)). Defendants argue that in Fait the Second Circuit correctly interpreted and applied the Supreme Court opinion Virginia Bankshares, 501 U.S. 1083 (1991), and this Court is bound to follow suit. *See also Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (citing to *Virginia Bankshares* and holding that opinions can "give rise to a claim under section 11 only if the complaint alleges

with particularity that the statements were both objectively and subjectively false or misleading").

While Defendants are correct that we are bound by Supreme Court precedent, we see nothing in *Virginia Bankshares* that alters the outcome in the instant case, and we decline to follow the Second and Ninth Circuits as a result. Reserving the question of whether scienter is necessary to make out a § 14(a) claim, the Supreme Court held in *Virginia Bankshares* that a plaintiff may bring a claim under § I 4(a) of the Securities and Exchange Act of 1934 for a material misstatement or omission even if the statement is vague and conclusory. *Virginia Bankshares*, 501 U.S. at 1093 ("[S]uch conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading"); 15 U.S.0 § 78n(a). The Court furthermore held that a defendant's disbelief in his own statement is not enough, on its own, for a plaintiff to make out a claim for a material misstatement under § 14(a). *Id.* at 1090, 1095-96. In other words, under § 14(a) a plaintiff is required to plead objective falsity in order to state a claim; pleading belief of falsity alone is not enough. *Id.* at 1095-96 ("proof of mere disbelief or belief undisclosed [standing alone] should not suffice for liability under § 14(a)"). In the instant case, the Plaintiffs have pleaded objective falsity. The Virginia Bankshares Court was not faced with and did not address whether a plaintiff must additionally plead knowledge of falsity in order to state a claim. *Id.* It therefore does not impact our decision today.

The Court, *at the same point* that it declined to discuss scienter, also explicitly limited its discussion to statements of opinion and belief that it presumed

were made with knowledge of falsity: "[W]e interpret the jury verdict as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made." *Id.* at 1090. A footnote to this sentence reserves "the question whether scienter [is] necessary for liability . . . under § 14(a)." *Id.* at 1090 n.5. The connection of these two statements indicates that the *Virginia Bankshares* Court itself tied the knowledge of falsity requirement to scienter but explicitly declined to address the issue further. Instead, it assumed the jury in the case had already found knowledge of falsity—whether necessary or not—and proceeded from there. *See id.* at 1090.

The Second and Ninth Circuits have read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this § 14(a) case into a § 11 context. Since the Supreme Court assumed knowledge of falsity for the purposes of the discussion in *Virginia Bankshares,* § 14(a) was effectively treated as a statute that required scienter.[3] The Virginia Bankshares discussion, therefore, has very limited application to § 11; a provision which the Court has already held to create strict liability. *See Huddleston*, 459 U.S. at 381-82.

The Second Circuit reads Justice Scalia's concurring opinion as support for their interpretation of *Virginia Bankshares*. *See Fait*, 655 F.3d at 111 (citing *Virginia Bankshares*, 501 U.S. at 1108-1109). Justice

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[3] In this Circuit § 14(a) does in fact require proof of scienter to state a claim. *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir. 1980).

Scalia wrote: "As I understand the Court's opinion, the statement 'In the opinion of the Directors, this is a high value for the shares' would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise." *Virginia Bankshares*, 501 U.S. at 1108-09. We do not think it is necessary to ignore Justice Scalia's interpretation of the majority *Virginia Bankshares* opinion; we only believe it is unreasonable to extend it to this case and §11. Because the Court chose to limit its discussion to "statements of belief and opinion . . . made with knowledge that" the statements were false, id. at 1090, any musings regarding mens rea are dicta. The Supreme Court was not faced with the question of knowledge of falsity requirements. Justice Souter carefully declined to discuss strict liability in his introduction to the majority opinion, and it would be unwise for this Court to add an element to § 11 claims based on little more than a tea-leaf reading in a § 14(a) case. While there are contexts in which dicta provides valuable insight into the Court's outlook, we must be careful in how it is extended and applied. This is a context in which extension of dicta is most dangerous. Even Justice Scalia's seemingly direct statement must be read in the context of § 14(a)—a non-strict liability statute. In writing the opinion, the Court could not have intended that musings regarding the requirement would later be applied to an unrelated statute. We therefore refuse to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon § 11 claims.

2.

We construe facts alleged in the complaint in the light most favorable to the Plaintiffs and accept all

factual allegations as true. *Kottmyer*, 436 F.3d at 688; *see Tellabs, Inc., v. Makor Issues & Right, Ltd*, 551 U.S. 308, 322 (2007). But complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Defendants argue that Plaintiffs have not met their burden under Rule 9(b) due to their reliance on qui tarn complaints and confidential sources. We disagree.

Defendants first argue that Plaintiffs' citations to qui tarn complaints are insufficient to sustain their claim. In order to support this argument, Defendants first contend that Plaintiffs have failed to conduct a "reasonable investigation" as required under Rule 11. *See Alrbright v. Upjohn Co.*, 788 F.2d 1217, 1220 (6th Cir. 1986); *see also* Fed. R. Civ. P. 11. This argument, however, was also raised in district court, and the court, at its discretion, did not issue sanctions or strike the relevant portions of the Third Amended Complaint. See Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass 'n, 524 F.3d 726, 739 (6th Cir. 2008) ("We review a district court's decision to grant or deny sanctions . . . arising from . . . Rule 11, under the abuse-of-discretion standard"). Rule 11 sanctions are a question of "whether the . . . attorney's conduct was reasonable under the circumstances." *Id.* (internal quotation marks and citations omitted). We see no reason to conclude that the district court abused its discretion for purposes of Rule 11.

Defendants next argue that allegations based on *qui tam* complaints nevertheless cannot withstand a motion to dismiss under Rule 9(b). Defendants cite to several cases in which courts, after noting reliance on third-party actions, have dismissed complaints under Rule 9(b). We do not believe this case necessitates

such action. The only Sixth Circuit opinion cited by Defendants, *Konkol v. Diebold, Inc.*, 590 F.3d 390 (6th Cir. 2009), *abrogated on other grounds by Frank v. Dana Corp.*, 646 F.3d 954 (6th Cir. 2011), is inapposite. In *Konkol*, this Court began by determining that the complaint, in a § 10b and Rule 10b-5 case, was insufficient to state a claim—on grounds that had nothing to do with third-party complaints.[4] *Id.* at 397-400. We then proceeded to address the plaintiffs' list of defenses to that holding, finding each of them insufficient. *Id.* at 400-04. One of these defenses was the existence of government investigations into the defendants' actions. Id. at 401-02. We stated that "(a]lthough a government investigation is not altogether irrelevant to the . . . analysis . . . [g]overnment investigations can result from any number of causes, and the investors have not pointed to any facts suggesting that the SEC investigation" supports their claim. *Id.* at 402.

The same is not true in the instant case. Plaintiffs do not simply cite to the existence of government investigations, they allege numerous reasons why the facts of those investigations support their claim. In *Konkol*, the plaintiffs relied on the fact that government agencies had dedicated resources to investigating defendants, and they therefore concluded, "as a matter of common sense," that something must be amiss. *Id.* at 401-02. The Plaintiffs here jump to no such conclusions. Instead of relying on the mere ex-

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[4] We also note that plaintiffs in *Konkol* were not only subject to Rule 9(b) but also to the higher more exacting pleading standards of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b), which are inapplicable in this case. *Konkol*, 590 F.3d at 396.

istence of *qui tam* complaints or investigations, they comprehensively discuss how the details are relevant to their own complaint, and give extensive rationale for that support. We find the other cases cited by Defendants similarly inapplicable.

Defendants' second argument is that the confidential witness statements in the complaint should be "steeply discounted." See *Omnicare I*, 583 F.3d at 946 (discounting the weight of the confidential witness statements). Even giving the confidential witness statements minimal weight, however, we do not doubt that sufficient facts have been presented to "raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 550 U.S. at 556. We therefore conclude that Plaintiffs have adequately met the particularity requirement of Rule 9(b).

B.

Plaintiffs also appeal the dismissal of their § 11 claim for GAAP-based misstatements and omissions. The district court held that Plaintiffs failed to plead knowledge of falsity and therefore failed to state a claim. Defendants argue that we should affirm because the GAAP allegations are based on "soft information." *Cf. In re Almost Family, Inc. Sec. Litig.*, No. 3:10-CV-00520-H, 2012 WL 443461, at *4 (W.D. Ky. Feb. 10, 2012) (holding that some GAAP allegations were soft information because the allegations in plaintiff's complaint focused on defendants' beliefs about accounting numbers, not on the actual data they reported). We disagree that Plaintiffs' GAAP allegations qualify as soft information. Plaintiffs' allegation is that Defendants' hard numbers were incorrect. These are allegations of hard facts and do not require pleading knowledge of falsity under any

standard. Even if we were to hold that the GAAP allegations are soft information, however, plaintiffs are not required to plead knowledge of falsity under § 11 to make out a claim for a material misstatement. Therefore, the district court erred in requiring Plaintiffs to plead knowledge of falsity with regard to the GAAP violations.

However, Plaintiffs still have to meet the particularity requirements of Rule 9(b) in pleading that GAAP violations occurred. As this Court noted in *Omnicare I*, Plaintiffs' GAAP allegations appear to contain some factual holes. In assessing Plaintiffs' 10(b) and 10b-5 claims, the *Omnicare I* Court stated:

> Although Plaintiffs list numerous alleged violations of GAAP rules, the complaint nowhere suggests how or when any of these alleged accounting improprieties were disclosed. Rather, Plaintiffs argue that they were implicitly disclosed because Omnicare's allegedly illegal conduct (drug recycling, etc.) translated into accounting violations. Thus, when news of the government raids appeared, the accounting statements were thrown into question by extension. This causation theory, however, rests entirely on speculation and is substantially undercut both by the lack of any financial restatements on Omnicare's part and by the willingness of third-party auditors to continue to certify Omnicare's GAAP compliance.

Omnicare I, 583 F.3d at 945.

While that analysis concerned whether Plaintiffs had adequately alleged "loss causation" with particularity, it is applicable to whether they have pleaded a GAAP violation at all. Plaintiffs' Third Amended Complaint alleges many GAAP-based violations, but as the Court noted in Omnicare I, the details of the accounting violations remain unclear. Although Plaintiffs' complaint has been amended since our previous opinion, Plaintiffs have not pointed to any updated information that would resolve these issues.

C.

Defendants urge us to affirm the district court on the alternative ground that the affirmative defense of loss causation is evident on the face of the complaint. "Loss causation" refers to the causal connection between the defendant's material misrepresentation or omission and the plaintiff's loss. *See Omnicare*, 527 F. Supp. 2d at 704-05. When an affirmative defense is evident on the face of a complaint, the complaint may be subject to dismissal under Rule 12(b)(6). *Jones v. Bock*, 549 U.S. 199, 215 (2007). Furthermore, this Court held in *Omnicare I* that the complaint did not adequately plead loss causation for the 10(b) and Rule 10b-5 claims. *Omnicare I*, 583 F.3d at 943-47.

Loss causation is an element of a § 10(b) and Rule 10b-5 claim but only an affirmative defense to a § 11 claim. The *Omnicare I* panel reversed the district court on the § 11 claim on exactly that basis. Had the Court determined that the affirmative defense of loss causation was evident from the face of the pleadings, it would have affirmed and dismissed the case. Instead, it chose to remand to the district court for further analysis. *Id.* at 948. The district court, having declined to reach this issue on remand, has not yet

addressed the merits of the argument. Although the complaint has been amended since Omnicare I was decided, the Defendants urge us to find loss causation on the basis of language in the outdated complaint. We therefore have no more information on this issue now than we had at the time of the *Omnicare 1* opinion.

"When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970); *see also Lewis v. Philip Morris Inc.*, 355 F.3d 515, 534 (6th Cir. 2004) (remanding due to the fact-intensive nature of the review required). The district court in this case has had many years to familiarize itself with the facts of this case and is in a stronger position than this Court to conduct the fact-intensive analysis this ruling requires.

IV.

For the foregoing reasons, we REVERSE the district court with regard to Plaintiffs' legal compliance claims and REMAND for further proceedings consistent with this opinion; and AFFIRM with respect to Plaintiffs' GAAP-based claims.

CONCURRENCE

GWIN, District Judge, concurring. I concur in the majority's thoughtful and comprehensive opinion. I write separately to make clear that the district court

retains the statutory and inherent discretion to resurrect previously dismissed claims and previously dismissed parties should later discovered evidence warrant it. *See Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 F. App'x 949, 959 (6th Cir. 2004) ("District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment.").

Rule 54(b) of the Federal Rules of Civil Procedure provides the statutory vehicle for such revision. If a court decides fewer than all the claims presented, as is the case here, dismissed claims can be revived until the entry of final judgment. Fed. R. Civ. P. 54(b) ("[A]ny order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). The district court's ability to reconsider past rulings must be tempered by "the sound public policy that litigation be decided and then put to an end." *Petition of U.S. Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973).

In deciding whether to revisit previously dismissed claims or parties, a district court may consider "(1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rodriguez*, 89 F. App'x at 959. (citing *Reich v. Hall Holding Co.*, 990 F. Supp. 955, 965 (N.D. Ohio 1998)). Simple reargument of evidence that had been available at the time of the earlier decision is usually not enough to warrant reconsideration. *Id.*

Rule 54(b) is particularly relevant in suits subject to the Private Securities Litigation Reform Act (PSLRA). The PSLRA, passed in 1995 after considerable lobbying by corporate and investment interests, mandates heightened pleading requirements to avoid dismissal. As one scholar notes, the PSLRA "created a super-heightened pleading standard for certain aspects of securities claims and deferred discovery until after resolution of an inevitably protracted motion to dismiss . . ." Arthur Miller, From Conley to Twombly to Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 11 (2010). Such motions to dismiss, as is the case here, often include questions of "scienter, loss causation, reliance, and materiality—questions that formerly would have been considered trial worthy." *Id.* Remarkably, the PSLRA imposes what amounts to a probabilistic pleading standard for scienter. *See Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (defining the "strong inference" of scienter under the PSLRA as "more than merely plausible or reasonable–it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent").

If newly-found evidence in a PSLRA case supports a previously dismissed claim's scienter (or materiality, or reliance, or loss causation) allegation, the district court could allow the claim to be revived. District courts are charged with enforcing rules "to secure the just, speedy, and inexpensive determination" of an action. Fed. R. Civ. P. 1. There's a reason that "just" precedes "speedy."

APPENDIX C

In the
United States District Court
for the Eastern District of Kentucky
Northern Division at Covington

No. 2006-26 (WOB)

Indiana State District
Council of Laborers
And HOB Carriers Pension
And Welfare Fund, et al.,

Plaintiffs,

v.

Omnicare, Inc.,
et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendants' motion to dismiss plaintiffs' Third Amended Complaint (Doc. 138).

Having previously heard oral argument on this motion, the Court now issues the following Memorandum Opinion and order.

BACKGROUND

The lengthy factual background to this case may be found in a prior opinion of the United States Court of Appeals for the Sixth Circuit, as well this Court's opinion from which that appeal arose. *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935 (6th Cir. 2009); *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 527 F. Supp.2d 698 (E.D. Ky. 2007).

For present purposes, it suffices to repeat that Defendant Omnicare, Inc. is a provider of pharmaceutical care services to residents of long-term care facilities in the United States and Canada. Defendant Gemunder was Omnicare's CEO; defendant Froesel was its CFO and a Senior Vice-President; defendant Hodges was its Secretary and a Senior Vice-President; defendant Hutton was Chairman of the Omnicare Board of Directors;[1] and defendant Laney was a Director.

On December 15, 2005, Omnicare completed a public offering of 12.8 million shares of common stock, in conjunction with which the company made certain filings with the Securities and Exchange Commission in August and November 2005, which were incorporated into a Registration Statement and

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[1] Defendants state that Mr. Hutton passed away while this case was on appeal to the Sixth Circuit.

Prospectus. (Third Amended Complaint ("TAC") ¶ 23).

Plaintiffs purchased stock through this public offering. (TAC ¶ 184). However, plaintiffs held that stock for only a short time, selling all of it by January 31, 2006. (Doc. 16-4 at 4; Doc. 52-2 at 3).

A. Procedural History of the Case

A review of the procedural history of the case is helpful to understand the issues now before the Court.

This case was filed on February 2, 2006, as a putative securities class action alleging claims for violations of § 10(b) and § 20(a) of the Securities Exchange Act of 1934. Plaintiffs alleged generally that defendants engaged in a fraudulent scheme that artificially inflated Omnicare's stock price by misrepresenting the company's financial results and business practices.

Following various preliminary matters, plaintiffs moved for leave to amend their complaint to add, as relevant here, an additional plaintiff (Cement Masons pension funds), asserting a claim for violation of § 11 of the Securities Act of 1933 based on allegedly false statements made in the Registration Statement issued in conjunction with the December 15, 2005,

public offering. The court granted plaintiffs' motion to amend their complaint.[2]

Defendants moved to dismiss the amended complaint on various grounds. In an Opinion and Order dated October 12, 2007, this Court granted defendants' motion to dismiss plaintiffs' complaint in its entirety. *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 527 F. Supp.2d 698 (E.D. Ky. 2007).

Plaintiffs appealed. (Doc. 95). On October 21, 2009, the Sixth Circuit issued an opinion affirming the dismissal of all claims, except the § 11 claim. *Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935 (6th Cir. 2009). The Sixth Circuit held that this Court had improperly dismissed the § 11 claim on the grounds that plaintiffs had not shown "loss causation" because such is not an element of a § 11 claim but rather is an affirmative defense thereto. *Id.* at 947.

Although the Sixth Circuit agreed with defendants that plaintiffs' § 11 claim sounds in fraud and is thus subject to Rule 9(b) 's heightened plead-

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[2] Because plaintiffs had previously filed an amended complaint styled as a Consolidated Amended Complaint (Doc. 27), what was labeled the "First Amended Complaint" was actually the second amendment to the pleadings. This accounts for the fact that plaintiffs continue to label the present incarnation of their complaint the "Second Amended Consolidated Complaint" when it is, in fact, a Third Amended Complaint, which label the Court uses herein.

ing requirements, the Court declined to reach defendants' alternative argument that the claim failed on that basis. *Id.* at 948. Instead, the Court stated that it would "leave the application of Rule 9(b)'s standards to the district court." *Id.*

After a stay during which plaintiffs pursued a petition for writ of certiorari, which they later dismissed, plaintiffs moved for leave to amend the complaint to replead the § 11 claim based on newly discovered information, and the Court granted this motion on July 14, 2011. (Doc. 133). Defendants responded with the motion to dismiss which is now ready for resolution.

B. Facts Alleged in Third Amended Complaint

As part of its Pharmacy Services Division, Omnicare provides consultant services in Long Term Care Facilities (LTCFs). (TAC ¶ 3). Plaintiffs allege that Omnicare utilized its pharmacy services to engage in extensive therapeutic interchange programs designed to market and sell high-profit drugs to LTCF patients. (TAC ¶ 4). Further, "Omnicare often implemented such initiatives in order to effect kickback arrangements with pharmaceutical manufacturers, whereby the Company received rebates in exchange for promoting the manufacturers' drugs." (*Id.*).

For the details of these alleged kickback schemes, plaintiffs cite to and incorporate allegations from whistleblower lawsuits filed against Omnicare, an investigation by the Department of Justice

("DOJ"), and a lawsuit against Johnson & Johnson filed by the DOJ and the United States Attorney's Office in Massachusetts. (TAC ¶ 6). Plaintiffs allege that these and other schemes were "approved and implemented at Omnicare's highest levels of management." (*Id.*) .

In particular, plaintiffs allege that Omnicare and Johnson & Johnson developed a scheme to market the drug Risperdal to nursing home patients with dementia, which was an illegal "off-label" use because the drug had been approved by the FDA only for the treatment of schizophrenia. (TAC ¶ 7).

Plaintiffs further allege that Omnicare "violated the Federal Anti-Kickback Statute by paying tens of millions of dollars to LTCFs in order to obtain or maintain pharmacy and services contracts with Omnicare." (TAC ¶ 8).

Plaintiffs allege that, at the time of the December 2005 public offering which is the basis of their § 11 claim, investors were unaware of these illegal activities because Omnicare concealed the kickback schemes and stated that the therapeutic interchanges were meant to "provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed" and that its contracts with drug companies were "legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve." (TAC ¶ 10). Plaintiffs allege that these statements contained in the Registration Statement were materially false and misleading. (TAC ¶ 11).

Plaintiffs also allege that Omnicare failed to comply with Generally Accepted Accounting Principles ("GAAP") such that the financial statements filed in connection with the December 2005 public offering contained material misrepresentations and/or omissions.

ANALYSIS

A. Section 11 of the Securities Act of 1933

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, imposes liability on persons who sign securities registration statements containing untrue statements of material fact or omissions of material fact. *J & R Marketing, SEP v. General Motors Corp.*, 549 F.3d 384, 390 (6th Cir. 2008).

Although § 11 plaintiffs are not required to plead or prove that the defendant acted with scienter, where the underlying allegations regarding the alleged misrepresentations or omissions sound in fraud, the requirements of Rule 9(b) apply. *Omnicare*, 583 F.3d at 948.[3]

Rule 9 (b) requires that a plaintiff "allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent

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[3] Because plaintiffs' allegations are clearly based on allegedly fraudulent and/or illegal activities, their attempted disavowal of any reliance on fraud in the TAC (TAC ¶ 178) is ineffective. *See In re Axis Holdings Ltd. Sec. Litig.*, 456 F. Supp.2d 576, 597-98 (S.D.N.Y. 2006) (discussing numerous cases so holding) .

scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (citation omitted).

"Loss causation," which refers to the causal connection between the material misrepresentation or omission and plaintiff's loss, is not an element of a claim under § 11 of the Securities Act. *See Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 947 (6th Cir. 2009) (citing 15 U.S.C. § 77l(b)). Rather, loss causation is an affirmative defense to a § 11 claim. *Id.*

Defendants have moved to dismiss the TAC on both Rule 9(b) and loss causation grounds.

B. GAAP-Based Statements/Omissions

Plaintiffs allege that, due to certain improper accounting practices, the 2005 Prospectus and related SEC filings substantially overstated the company's revenue, operating income, and goodwill. (TAC ¶¶ 118-139). Thus, they allege, the statement that the filings contained no untrue statement of material fact and fairly presented the financial condition of the company were false and materially misleading. (TAC ¶¶ 166-67).

As this Court previously noted, allegations of GAAP violations, standing alone, do not satisfy the particularity requirements of Rule 9(b). (Doc. 133 at 5 (citing *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1269 (11th Cir. 2006)). "Omnicare's auditors certified

Omnicare's GAAP compliance with respect to the financial statements in issue, and Omnicare has never restated these financials." *Id.*

Plaintiffs' TAC details numerous accounting practices that they allege violated GAAP. (TAC ¶¶ 100-167). However, a close review of these densely-detailed paragraphs – many of which simply incorporate allegations from other legal actions against Omnicare -- shows that plaintiffs allege no particularized facts showing that defendants knew or were reckless in regard to the fact that financial statements in question were compiled in violation of GAAP.[4]

For example, plaintiffs allege that Gemunder and Froesel were personally involved in one of the underlying transactions which plaintiffs allege was unlawful (TAC ¶¶ 118-128), but they do not allege that these defendants had any involvement with how that transaction was booked or how it was treated for accounting purposes. The allegation that these defendants knew that the financial statements issued in connection with the December 2005 public offering were false or misleading thus requires an inference that lacks any alleged factual basis.

Plaintiffs also allege, based on information from a confidential informant ("CW2"), that Omnicare failed to adequately reserve for doubtful receivables and failed to write-off uncollectible receivables.

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[4] In fact, the TAC contains not a single factual allegation specific to defendants Hodges, Hutton, and Laney.

(TAC ¶¶ 145-146). Again, however, no allegations link these accounting deficiencies to knowledge on the part of the defendants as to the accuracy of the financial statements contained in the offering materials.[5] The allegations from confidential witnesses CW3, CW4, CW5 (TAC ¶¶ 147-151) suffer from the same flaws.

Similarly, CW6's allegation that Froesel and Gemunder wanted the company's financial reporting to "look good, not to make it accurate" lacks the specificity required by Rule 9(b) for a claim grounded in fraud.[6]

For these reasons, plaintiff's allegations of material misstatements or omissions in the 2005 offering documents based on GAAP violations do not satisfy the requirements of Rule 9 (b).

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[5] The closest allegation is: "It was CW2's experience that defendant Gemunder and other senior management . . . denied write-offs" that would have been called for under GAAP. (TAC ¶ 145). This is still vague, however, and it does not actually allege that Gemunder or anyone else knew such denials to be in violation of GAAP, much less that he knew that such denials resulted in false financial statements.

[6] The Court assumes for purposes of this discussion that these confidential witnesses are identified with sufficient detail. However, it notes that plaintiffs' statement that the Court previously found similarly-described confidential witnesses to be reliable (Doc. 139 at 31) is incorrect. In fact, the Court held the exact opposite. *See Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 527 F. Supp.2d 698, 710-11 (E. D. Ky. 2007).

C. Statements Regarding Legal Compliance

Plaintiffs allege a second category of material misstatements/omissions in the December 2005 offering materials by way of statements that: Omnicare's therapeutic drug interchange programs were meant to provide patients with more efficacious or safer drugs; Omnicare's contracts with drug manufacturers were legally and economically valid and brought value to patients; and Omnicare believed that its contracts complied with federal and state laws. (TAC ¶¶ 10, 27, 46).

As both this Court and the Sixth circuit have noted, statements regarding a company's belief as to its legal compliance are considered "soft" information and are generally not actionable. *See Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 945 (6th Cir. 2009) (citing *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 401-02 (6th Cir. 1997)); *Omnicare*, 527 F. Supp.2d at 709-10.

Plaintiffs argue that this principle is inapplicable here because they allege that "defendants knew the statements were untrue at the time they were made." (Doc. 139 at 25) . In support of this assertion, plaintiffs again identify allegations concerning only two of the defendants: Froesel and Gemunder.

These allegations, taken as true, establish that these two defendants were involved in planning and implementing Omnicare's therapeutic drug interchange programs and did so with the goal of improv-

ing the company's profitability. This does not get plaintiffs very far. Presumably all publicly-traded companies conduct their activities in order to be profitable. That is a far cry, however, from inferring that the company's officers knew they were violating the law.

Plaintiffs further state in their brief that the TAC alleges that Froesel directed that "false clinical data" be created and provided to physicians. (Doc. 139 at 26). The paragraphs of the TAC cited, however, do not support that serious allegation. Although couched in ominous tones, these paragraphs actually allege (through a confidential witness, CW1) only that Froesel identified regions that needed a "revenue boost" and directed Regional CFOs to garner data to support initiatives which would lead to such increased revenues through the drug interchanges. (TAC ¶¶ 33-34). The ensuing paragraphs which allege that Omnicare employees then put a "clinical spin" on information communicated to physicians and LTCFs support no inference of illegality. The averment that letters sent by Omnicare to physicians "misrepresent[ed] the efficacy and/or cost benefits of the target drug" lacks any alleged nexus to Froesel. (TAC ¶ 38). Nor does the complaint allege that such misrepresentations were made at Froesel's direction or with his knowledge.

The allegations against Gemunder are similarly lacking. For example, the TAC -- as opposed to plaintiffs' brief -- alleges only that Gemunder approved drug-switching initiatives that would increase Omnicare's profitability. (TAC ¶ 31). The allegations

about the "Risperdal Initiative" specifically make no mention of Gemunder. (TAC ¶¶ 67-71).[7]

Further, contrary to plaintiffs' arguments, the Sixth Circuit has also rejected the argument that Omnicare had a "duty to disclose" its allegedly illegal activities. *Omnicare*, 583 F.3d at 946.

CONCLUSION

In sum, the TAC does not provide sufficient factual basis to support the § 11 claim asserted against defendants. The Court thus need not reach the arguments regarding loss causation.

Therefore, having reviewed this matter, and the Court being otherwise sufficiently advised,

IT IS ORDERED that defendants' motion to dismiss plaintiffs' Third Amended Complaint (Doc. 138) be, and is hereby, **GRANTED**. A separate Judgment shall enter concurrently herewith.

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[7] Plaintiffs cite in their brief a "corporate document" attached to the TAC as Exhibit 7 as evidence of their claim against Gemunder. This document - which is unexplained and unauthenticated (indeed, it is not clear who the author is), merely states: "Joel Gemunder, President of Omnicare contacted David Norton, Pres. of Janssen on Friday, Sept. 18 to say that Omnicare would continue to support Risperdal." The Court finds nothing in this document to support the inferences plaintiffs advocate.

This 13th day of February, 2012.

Signed By: William O. Bertelsman WOB
United States District Judge

APPENDIX D

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0370p.06

United States Court of Appeals for the Sixth Circuit

No. 07-6379
INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, ON BEHALF OF ITSELF AND ALL Others Similarly Situated, et al.,
Plaintiffs-Appellants,

ALASKA ELECTRICAL PENSION FUND, ON Behalf of Itself and All Others Similarly Situated,
Intervenor-Appellant,

v.

OMNICARE, INC.; JOEL F. GEMUNDER; DAVID W. FROESEL, JR.; CHERYL D. HODGES; EDWARD L. HUTTON; SANDRA E. LANEY,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 06-00026—William O. Bertelsman, District Judge.

Argued: September 18, 2008

Decided and Filed: October 21, 2009

Before: DAUGHTREY and GILMAN, Circuit Judges; MILLS, District Judge.*

COUNSEL

ARGUED: Eric Alan Isaacson, COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP, San Francisco, California, for Appellants. Harvey Kurzweil, DEWEY & LeBOEUF LLP, New York, New York, for Appellees. **ON BRIEF:** Eric Alan Isaacson, Henry Rosen, Jennifer L. Gmitro, Shirley H. Huang, COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP, San Francisco, California, Kevin L. Murphy, GRAYDON HEAD & RITCHEY, LLP, Fort Mitchell, Kentucky, for Appellants. Harvey Kurzweil, William T. Conway III, Richard W. Reinthaler, James P. Smith III, DEWEY & LeBOEUF LLP, New York, New York, John E. Schreiber, DEWEY & LeBOEUF LLP, Los Angeles, California, Douglas R. Dennis, Stephen M. Gracey, FROST BROWN TODD LLC, Cincinnati, Ohio, William T. Robinson III, FROST BROWN TODD LLC, Florence, Kentucky, for Appellees.

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* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

OPINION

MILLS, District Judge. Seizing on a few vague statements from management, the plaintiffs try to turn bad corporate news into a securities class action.

Because the Private Securities Litigation Reform Act ("PSLRA") forbids such alchemy, we generally affirm the district court's dismissal, although we reverse its disposition regarding the claims brought under the Securities Act of 1933, 15 U.S.C. § 77k.

I. BACKGROUND

A. General Information

Defendant Omnicare, Inc. is the nation's largest provider of pharmaceutical care for the elderly, handling medication distribution for nearly 1.5 million patients across most states and in Canada. Reflecting the size of its operations, Omnicare's phar-

macy services generated $5.3 billion in net sales in 2005 alone.[1]

The plaintiff class (Plaintiffs) consists of Omnicare investors who purchased securities between August 3, 2005, and July 27, 2006. The Laborers Council was selected as lead plaintiff under the PSLRA. *See* § 21D(a)(3)(B), 15 U.S.C. § 78u-4(a)(3)(B). It purchased Omnicare securities throughout December 2005 and January 2006, and sold all of them at the end of January 2006.

Also implicated in this case are several individual defendants. Three of these defendants are officers of Omnicare: CEO, President, and Director Joel Gemunder, CFO and Senior Vice President David Froesel, and Secretary and Senior Vice President Cheryl Hodges. The remaining individual defendants are board members: Chairman Edward Hutton and Director Sandra Laney.

Plaintiffs allege that the defendants committed fraud in violation of § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, as well as Rule 10b-5, 17 C.F.R. 240.10b-5. Plaintiffs also allege liability for Gemunder, Froesel, and Hodges under § 20(a), 15 U.S.C. § 78t(a), and liability for all defendants under § 11 of the Securities Act of 1933 ("SA"), 15 U.S.C. § 77k.

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[1] Technically, Omnicare is comprised of two business segments: Pharmacy Services and Contract Research Organization Services. But this detail may largely be ignored since 97% of Omnicare's revenue comes from Pharmacy Services.

The parties pull four sets of § 10(b) fraud claims out of Plaintiffs' sprawling and repetitive First Amended Consolidated Complaint. Briefly, these claims concern misleading statements or omissions relating to: (1) Medicare Part D preparedness, (2) a contract dispute with United Health Group (UHG), (3) violations of Generally Accepted Accounting Principles (GAAP), and (4) the legality of Omnicare's alleged drug recycling program and drug substitution program. The claim under § 11 also relates to the alleged GAAP violations. We summarize each set of claims in turn.

B. Medicare Part D Preparedness

In 2003, the Medicare Prescription Drug, Improvement and Modernization Act created Medicare Part D, a voluntary prescription drug benefit program for seniors.

Under this program, private entities (typically insurance providers) contract with the Centers for Medicare and Medicaid Services ("CMS"), a division of the Department of Health, to offer approved prescription drug plans ("PDP"). Pharmacies such as Omnicare contract with the PDP providers to supply the enrollees with the required prescription drugs. The PDP providers are compensated through a combination of enrollee premiums and reimbursement for the drugs provided (at an 8% mark up) from the CMS.

In late 2005, Omnicare was preparing for the industry's transition to Medicare Part D on January 1, 2006. Plaintiffs aver that Omnicare, on two sepa-

rate dates, misled the public about its readiness for this transition on several occasions.

First, in an August 3, 2005, press release, Gemunder stated:

> There are still many specifics yet to be determined through subregulatory guidance by CMS, as well as the approval of specific PDPs by CMS. . . . All things considered, we see nothing materially adverse about the regulations at this time and believe we are well-positioned to add value under the new Medicare Part D benefit. We will monitor developments and continue to ready our company as the year progresses.

During a conference call on the same day, Gemunder elaborated:

> We have been extremely busy in the last couple of months, working with potential PDP's to familiarize them about the specialized services required and the nuances of providing pharmacy services to long-term care residents and negotiating agreements for our participation in their pharmacy networks to serve the long-term care market. . . . [W]e're pretty confident that we're not going to be hurt by moving into the Part D structure, vis-a-vis where we are now.

Second, Plaintiffs allege that Gemunder made further misleading statements on November 2, 2005. In a press release, Gemunder stated:

> "We remain highly focused on the upcoming implementation of the Medicare Drug Benefit. While bringing about sweeping change in our industry, we believe we are well-positioned to add value under the new Medicare Part D benefit. . . . As the enrollment process begins, we are busy educating our long-term care facility clients and their residents on the availability and implementation of the new drug benefit . . . ."

Gemunder reiterated these points in a conference call that same day:

> "So we have been focused this quarter on training and on educating our employees, and seeing to the operational issues, related to the implementation of the new drug benefit. And with the enrollment period beginning November 15th, we have also been heavily been [sic] engaged in educating our long-term care facility clients and their residents, on the availability of the new benefit, as well as working with them on the implementation process . . . ."

Plaintiffs complain that these statements, and others, were misleading because Omnicare failed to sufficiently monitor developments (including perfor-

mance of a crosscheck of their databases against a national database) and neglected to properly educate the drug-plan suppliers on pharmacy care practices. The result was a rocky transition to Part D, costing approximately $9.8 million in overtime and related expenses.

C. UHG Contract Dispute

Next, Plaintiffs assert that Omnicare's positive earnings growth predictions were misleading in light of an undisclosed contract dispute with UHG, a major PDP sponsor. On February 23, 2006, Gemunder commented on the fourth-quarter 2005 results by stating that "as we enter our 25th year as a public company, Omnicare's revenue and earnings growth outlook remains positive given our strong underlying fundamentals and our proven growth strategy." In an April 27, 2006, statement regarding Omnicare's first quarter 2006 results, Gemunder repeated that "Omnicare's revenue and earnings growth outlook remains positive given our strong underlying fundamentals and our proven growth strategy."

Plaintiffs argue that these statements were false and misleading because Gemunder did not disclose a developing dispute with UHG. UHG, a drug-plan supplier responsible for about a third of Omnicare's Part D business, had recently completed a merger with PacifiCare Health Services, Inc. PacifiCare also had a contract with Omnicare, but it was less profitable. Some time in February 2006, UHG informed Omnicare that, as a result of the merger, it would be withdrawing from its original contract and switching to the less favorable PacifiCare agreement.

This change reduced Omnicare's profits for the second quarter of 2006.[2]

Plaintiffs claim that Gemunder's growth predictions were misleading absent a disclosure of this development. The contract dispute was not revealed until May 18, 2006, when Omnicare filed suit against UHG.[3] In response to the filing, Omnicare's stock dropped from $54.98 to $50.57.

D. GAAP Violations

From the second quarter of 2005, to the first quarter of 2006, Omnicare reported large, sometimes record, revenues. Commenting on the second quarter revenues, Gemunder stated that "[o]ur sales once again hit record highs, and our operating margins improved on a sequential basis, reflecting the growing benefits of our cost reduction and productivity enhancement initiatives." Hodges added that revenue per patient was up over prior years. Similar sentiments were expressed in relation to later quarters and filings certified by Gemunder and Froesel also reflected this revenue growth.

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[2] At one point, the complaint states that Omnicare's profits dropped 51%. However, the complaint also quotes a document putting Omnicare's *total* profit decline was at 51% for the quarter. This translated into $30.4 million or 25 cents per share. The complaint goes on to quote the document's conclusion that the loss attributable to UHG's contract switch was $18.3 million or 9 cents per share.

[3] A district court later granted UHG's summary judgment motion on these claims. *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 594 F. Supp. 2d 945 (N.D. Ill. 2009).

Plaintiffs allege that these statements were misleading because Omnicare's revenue numbers for 2005 and early 2006 were inflated by non-compliance with GAAP. They allege: (1) improper revenue recognition, (2) overvaluation and improper recognition of receivables, (3) overvaluation of inventories, and (4) the failure to establish, in a timely manner, litigation settlement reserves with respect to several government investigations (discussed below).

E. False Assurances of Legal Compliance

Finally, Plaintiffs accuse Omnicare of falsely claiming that the company complied with the law when it was involved in two illegal practices: improper drug recycling and improper drug substitution. As to the former allegations, Plaintiffs say that Omnicare was repackaging and reshipping drugs with varying expiration dates, including some expired drugs. The latter allegation relates to a scheme to replace cheaper doses of certain medicines with more expensive doses (*e.g.*, capsules for tablets) in order to increase revenue.[4]

In light of these practices, Plaintiffs allege that Omnicare made materially misleading statements on a number of occasions when it assured the public that it was complying with the law. For example, a November 7, 2005, a press release explained that "Om-

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[4] Passing references are also made to a scheme to replace generic drugs with brand-name ones. It is unclear where this alleged scheme fits into the Plaintiffs' claims.

nicare's policy is to comply with all applicable federal and state laws and regulations. To the best of our knowledge, our purchases of pharmaceuticals comply with all applicable laws and regulations and are consistent with Omnicare's goal of providing appropriate pharmaceutical care cost-effectively for the seniors we serve." Similar statements were allegedly made in January and February 2006.

In January 2006, several government raids were conducted on Omnicare facilities. By late 2006, two settlements had resulted. The first involved one of Omnicare's Michigan subsidiaries, Specialized Pharmacy, whose president was charged with fraud. This case was settled for $52.5 million. The second settlement was with the attorney generals of 43 states and involved Omnicare's alleged substitution of dosage forms on several generic drugs (*e.g.*, tablets with capsules). This settlement obligated Omnicare to pay $49.5 million.

F. District Court Ruling

Finding the FACC insufficient, the district court granted Defendants' motion to dismiss. The court began with the § 10(b) and Rule 10b-5 claims, dismissing the Part D statements and the GAAP violations for a failure to plead loss causation. Turning to the statements regarding legal compliance, the court noted that loss causation might also be lacking, but dismissed the action on other grounds. First, it held that any statements concerning legality of a company's actions were "soft" statements, for which disclosure was not required. Second, the court discounted the value of the confidential witness testi-

mony in the complaint and held that no strong inference of scienter existed.

With respect to the UHG contract dispute, the Court found that the Laborers Council, the lead plaintiff, had sold its securities before the relevant disclosure and therefore lacked standing. The district court also denied a motion to intervene by Alaska Electrical Pension Fund (a party ostensibly possessing standing), holding that a further amendment was barred by the PSLRA and, alternatively, concluding that any intervention was futile in light of the lack of scienter.

Next, the district court dismissed Plaintiff's § 11 action. In a footnote, the Court explained: "The Section 11 claim, which also sounds in fraud and is based on the alleged accounting violations, fails on the same grounds [i.e., failure to allege loss causation]."

Having dismissed all claims of primary securities violations, the court rejected application of control-person liability under § 20.

II. STANDARD OF REVIEW

A district court's grant of a Rule 12(b)(6) motion to dismiss is reviewed de novo. *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008) (citing *Robert N. Clemens Trust v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 845 (6th Cir. 2007)). All well-pleaded facts in the complaint are accepted as true. *Ley v. Visteon Corp.*, 543 F.3d 801, 805 (6th Cir. 2008). "In addition to the allegations in the com-

plaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice." *Id.* (quoting *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2008)). Further, we may affirm on any supportable ground, even if the district court invoked other grounds for its ruling. *Id.* at 805-06.

III. ANALYSIS

A. Securities and Exchange Act Claims: 10(b) and Rule 10b-5

'Section 10(b) of Securities and Exchange Act and Rule 10b-5 prohibit fraudulent, material misstatements in connection with the sale or purchase of a security.' *Zaluski*, 527 F.3d at 570 (quoting *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 680-81 (6th Cir. 2004)) (internal quotation marks omitted). A private right of action for violations exists where a plaintiff can demonstrate the following elements: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 768 (2008); *see also Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 917 (6th Cir. 2007).

Because § 10(b) claims sound in fraud, the pleading strictures of Federal Rule of Civil Procedure 9(b) apply. *Frank v. Dana*, 547 F.3d 564, 569-70 (6th

Cir. 2008). Thus, the complaint must "'(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Id.* at 570 (quoting *Gupta Terra Nitrogen Corp.*, 10 F. Supp. 2d 879, 883 (N.D. Ohio 1998)).

Bolstering this rule of specificity, the PSLRA imposes further pleading requirements. *Id.* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007)). First, the complaint must "specify each statement alleged to have been misleading" along with "the reason or reasons why the statement is misleading." 15 U.S.C. § 74u-4(b)(1). Second, plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). *See Frank*, 547 F.3d at 570.

1. UHG Dispute

In order to recover under § 10(b) and Rule 10b-5, a plaintiff must show both an omission or misstatement and its materiality. *Zaluski*, 527 F.3d at 571. Materiality can be established by proof of a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988)). When a company chooses to speak, it must "provide complete and non-misleading information." *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998). However, liability does not attach to mere corporate puff-

ery or statements of corporate optimism. *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004). Further, a safe-harbor "excuses liability for defendants' projections, statements of plans and objectives, and estimates of future economic performance." *Helwig v. Vencor, Inc.*, 251 F.3d 540, 547-48 (6th Cir. 2001) (en banc) (citing 15 U.S.C. § 78u-5(i)(1)). This protection is overcome only "if the statement was material; if defendants had actual knowledge that it was false or misleading; and if the statement was not identified as 'forward-looking' or lacked meaningful cautionary statements." *Id.* At 548 (citing 15 U.S.C. § 78u-5(c)(1)).

With regard to the UHG dispute, Plaintiffs do not explain why, as a general matter, Omnicare had a duty to disclose its contractual dispute with UHG any earlier than it did. Rather, Plaintiffs focus on a statement made by Gemunder on two occasions: "Omnicare's revenue and earnings growth outlook remains positive given our strong underlying fundamentals and our proven growth strategy." According to Plaintiffs, this predictive statement was misleading absent disclosure of the contract dispute.

The problem with this argument, however, is that Gemunder's comments are forward-looking statements entitled to safe-harbor protection. Indeed, not only does the statement itself call attention to its predictive character ("growth outlook") but even the complaint identifies it as "a positive outlook on future revenue." Further, to the extent that the reference to the outlook "remaining" positive implies some present circumstances, that is not enough to take this statement out of the safe harbor. *See Miller v. Champion*

Enterprises Inc., 346 F.3d 660, 676-77 (6th Cir. 2003) (relying on 15 U.S.C. § 78u-5(i)(1)(D) and finding reference to use of term "continuation" in phrase "continuation of outstanding earnings growth" did not transform an otherwise forward-looking prediction into an unprotected mixed statement).

Even putting that exception aside, Gemunder's statements cannot be deemed material. Courts have consistently found immaterial "a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace - loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important. . . ." *In re Ford Motor Co. Sec. Litig., Class Action*, 381 F.3d 563, 570-71 (6th Cir. 2004) (*quoting Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996)). Gemunder's comments fall squarely within this realm of corporate puffery, as they do nothing more than vaguely predict positive future results, a claim so banal and ubiquitous that it cannot engender reliance by reasonable investors. *See San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996) (statements of optimism about earnings and claim predicting "income growth consistent with . . . historically superior performance" were "puffery").

Therefore, we find that the complaint fails to allege a material misstatement or omission.[5]

2. Part D Implementation

Plaintiffs allege that Gemunder's statements and predictions concerning Omnicare's transition to Part D were misleading in light of Omnicare's allegedly insufficient and untimely training as well as the difficulties encountered in implementation. The district court dismissed this claim, finding that loss causation had not been adequately pled. We agree with that assessment.

In a securities action, the plaintiff bears the burden of proving loss causation, 15 U.S.C. § 78u-4(b)(4), as well as pleading it. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346-48 (2005). "Loss causation requires 'a causal connection between the material misrepresentation and the loss.'" *Brown*, 481 F.3d at 920 (quoting Dura, 544 U.S. at 342). Price inflation alone is insufficient; rather, a plaintiff must show that an economic loss occurred after the truth behind the misrepresentation or omission became known to the market. *See Dura*, 544 U.S. at 346-47.

Assuming that Gemunder's statements are otherwise actionable, loss causation is thoroughly lacking in this case. Although a number of allegations relate to Omnicare's alleged Part D shortcomings, none explain how the statements were revealed to be

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[5] Since Alaska Electrical's claims would fail for the same reason, we also affirm the denial of the motion to intervene.

false and thereby caused a drop in the stock price. Indeed, the sole "loss causation" allegation identified by the Plaintiffs is a fragment of a sentence imbedded in the complaint's block quote of an article from *TheStreet.com*. The entire sentence reads: "The institutional pharmacy [Omnicare] has found itself caught up in two government probes *even as it struggles to overcome major glitches associated with the new Medicare Part D drug coverage program.*" (emphasis added). Tellingly, this quote does not appear in the section of the complaint dealing with Part D, but rather in a discussion of loss causation relating to various government raids. Further, the complaint fails to explain why this minor problem, as opposed to the raids, caused the ensuing decline in stock value. *See Dura*, 544 U.S. at 343 ("To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires."); *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 842 (7th Cir. 2007) ("To plead loss causation, the plaintiff must allege that it was the very facts about which the defendant lied which caused its injuries."). Quite to the contrary, the complaint expressly attributes the decline in share price to the confluence of governmental probes, not the news of Part D difficulties. As a result, we cannot conclude that loss causation has been adequately pled with respect to the implementation of Part D.

3. GAAP Violations

Plaintiffs have also failed to plead loss causation under § 10(b) regarding Omnicare's alleged misstatements premised on non-compliance with GAAP. Although Plaintiffs list numerous alleged violations

of GAAP rules, the complaint nowhere suggests how or when any of these alleged accounting improprieties were disclosed. Rather, Plaintiffs argue that they were implicitly disclosed because Omnicare's allegedly illegal conduct (drug recycling, etc.) translated into accounting violations. Thus, when news of the government raids appeared, the accounting statements were thrown into question by extension. This causation theory, however, rests entirely on speculation and is substantially undercut both by the lack of any financial restatements on Omnicare's part and by the willingness of third-party auditors to continue to certify Omnicare's GAAP compliance. In short, the complaint does not suggest that the alleged GAAP violations were ever recognized by or revealed to the market. Therefore, loss causation is again lacking.

4. Legal Compliance

Finally, Plaintiffs seek recovery based on Omnicare's claims of "legal compliance." Defendants argue that its statements regarding "legal compliance" are not actionable because companies have no duty to opine about the legality of their own actions. As a general matter, that is true. Such information is considered "soft" and, therefore, disclosure is not required. *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 401-02 (6th Cir. 1997).

But Plaintiffs object to application of this rule because Omnicare did not stay completely silent; instead, it made several general statements that it complied with state law and regulations and had a

policy of complying with the law.[6] Thus, Plaintiffs argue that liability can be imposed based on these statements and that Omnicare had a duty to disclose its involvement in "illegal" activities. We disagree.

In *Kushner v. Beverly Enterprises, Inc.*, the Eighth Circuit reviewed a case very similar to this: a company made a general assertion that it complied with Medicare regulations but was later embroiled in a large Medicare fraud investigation. 317 F.3d 820, 824-25, 830-31 (8th Cir. 2008). Relying on this Court's decisions in *Sofamor Danek and Helwig*, the Eighth Circuit assumed that liability could attach to a company's general assertion of legal compliance, but only where the complaint "adequately pleaded that the defendants knew the statements were untruthful." *Id.* at 831. Since no such allegations were made, the pleading was deemed inadequate. *Id.*

This case is no different. Although Plaintiffs claim that Omnicare's "legal compliance" claim was made with knowledge of its falsity, few factual allegations support this claim. Indeed, although three confidential witnesses reported various drug-handling practices that they considered illegal, only the allegations of CW6 suggest any knowledge on the part of any of the defendants. In particular, CW6 asserted that "Froesel would contact Regional CFOs twice each quarter to implement the therapeutic inter-

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[6] The bulk of these statements come from newspaper articles. We assume, without deciding, that these statements can be sufficiently attributed to Omnicare. *See Raab v. Gen. Physics Corp.*, 4 F.3d 286, 288-89 (4th Cir. 1993).

change program where the more expensive branded drugs were substituted for the cheaper and less profitable . . . ." But this does little to aid the Plaintiffs. First, no information is given regarding CW6 except the title of his position. As a result, any inferences drawn from his accusations must be steeply discounted. *Ley*, 543 F.3d at 811. Second, the allegations of illegality in this case relate to drug recycling and an alleged scheme to change forms of dosages (e.g., capsules for tablets), not branded drugs being substituted for generic drugs.[7] Hence, there is a disconnect between what Froesel allegedly knew (branded-for-generic drugs) and what was allegedly revealed to the market (dosage substitutions and recycling). Further, even if this statement did involve drug recycling or dosage substitution, it still fails to show falsity because no allegations establish when the defendants were aware of the wrongdoing or, for that matter, when the wrongdoing was occurring. Thus, as in Kushner, the complaint fails specifically to allege that defendants knew their statements of "legal compliance" were false when made.

Nor did Omnicare have a duty to disclose its "illegal" operations based on its "legal compliance" claim. In *Zaluski*, we dealt with a statement claiming not legal compliance, but rather that the company "complied with provisions" of a contract. *Zaluski*, 527 F.3d at 568. The defendant in that case (the parent

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[7] CW6 does state that "Omnicare made the switches [from tablets to capsules of Ranitidine] . . . simply to charge a higher price." Nothing, however, suggests who at Omnicare knew of this policy, when they knew, or even when it was in effect.

company of Omnicare) had a contract with the state of Tennesse, prohibiting payments to Tennessee officers or employees; violations could result in fines or the termination of the entire contract. Despite these potential consequences, the defendant made a large number of monthly payments to a Tennessee senator. When the scheme began to unravel, the defendants issued a press release claiming that the payments were made for out-of-state consulting. *Id.* at 567-70.

We found that the press release in *Zaluski* was "an affirmative misleading statement," but nevertheless held that Omnicare did not have to disclose that the payments constituted a breach of contract:

> The April 15 press release . . . is an affirmative misleading statement .... However, Plaintiffs do not allege simply that the payment was made, but that the making of the payment created a voidable contract or the possibility of fines and sanctions by the State of Tennessee. Thus, Plaintiff's allegation refers to the consequences of the payment, not the payment itself. . . . These consequences are the type of predictions and soft information that do not give rise to a duty of disclosure.

Id. at 575-76.

We also noted in *Zaluski* that the statements regarding the contract, though misleading, did not require further disclosures:

> In *City of Monroe*, once the company chose to speak regarding an objective fact, it was required to qualify that representation with known information undermining (or seemingly undermining) the claim. This objective fact did not turn on decisions made by external parties, such as whether to fine the company for violations of safety standards, but on a statement that was directly in conflict with data in the company's possession. In *City of Monroe*, the defendants issued a statement that 'the objective data clearly reinforces our belief that these are high quality, safe tires'; the defendants in fact had data that indicated the opposite. In contrast, the complained-of omission in this case is that payments made to [the Senator] could have resulted in Tennessee's decision to void the contract or fine the company. There is no evidence that [defendant] believed either of these actions to be forthcoming.

Id. at 576.

The *Zaluski* misrepresentation was that the payments to the Senator were for out-of-state work; in other words, the payments to the Senator complied with the contract. Here, Omnicare said even less, merely making a generic claim that they complied with the law without providing any specifics and generally refusing to discuss the case. As such, additional disclosures of potential legal findings and conse-

quences would be even less justified here than in Zaluski. Further, as in Zaluski, the materiality of the alleged omission derives solely from predictions regarding the actions of third parties, particularly whether fines or other sanctions would be brought based on findings of regulatory violations. This information is "soft," and no disclosure is required despite the generalized claim of "legal compliance."

In sum, the complaint does not sufficiently establish that defendants actually knew that the "legal compliance" statements were false when made. Nor did the generic claim of lawfulness, in the absence of any specifics, require the disclosure of the allegedly "illegal" activities. Therefore, we find that the district court properly dismissed this claim as well.

B. Securities and Exchange Act Claim: § 20

Plaintiffs also allege that the defendant officers (Gemunder, Froesel, and Hodges) are liable under § 20 of the Securities and Exchange Act , 15 U.S.C. § 78t(a). When a primary violation of securities law is shown, that provision imposes joint and several liability on "controlling persons." However, as discussed above, the district court properly dismissed the Plaintiffs' claims under § 10(b) and Rule 10b-5. Therefore, dismissal of control person liability under § 20 was also proper.[8]

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[8] As discussed below, Plaintiffs' claim under § 11 may survive. However, control person liability for violations of the Securities Act of 1933 is imposed under § 15 of that Act, not § 20 of the Securities and Exchange Act of 1934.

C. Securities Act Claim: § 11

The complaint also alleges a violation of § 11 of the Securities Act of 1933 based on Omnicare's alleged GAAP abuses. The district court dismissed this claim on the same grounds as the Securities and Exchange Act claims, namely a lack of loss causation. Loss causation, however, is not an element of a § 11 claim, but an affirmative defense to it. *See* 15 U.S.C. § 77l(b). Thus, the district court erred in dismissing this claim on that ground.

Recognizing this problem, Omnicare recharacterizes the lower court's opinion, suggesting that the district judge found the affirmative defense on the face of the complaint. Nothing in the opinion's brief footnote on § 11 supports this position.

Defendants also urge us to affirm on a different ground: that the § 11 claims fail to allege the underlying GAAP violations with the specificity required by Rule 9(b). We agree with Defendants that, since the GAAP violations sound in fraud, Rule 9(b) must apply. *See ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 68 (1st Cir. 2008) (noting the specificity requirement when the claim is grounded in fraud); *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277 (11th Cir. 2006) (discussing the specificity requirement in cases which involve fraud); *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160-63 (3d Cir. 2004) (same); *Rombach v. Chang*, 355 F.3d 164, 170-71 (2d Cir. 2004) (same); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368-69 (5th Cir. 2001) (claims must sound in fraud in order to be subject to dismissal under Rule 9(b)); *In re*

Stac Electronics Sec. Litig., 89 F.3d 1399, 1404-05 (9th Cir. 1996) (Rule 9(b) requirements apply to claims brought under § 11 which are grounded in fraud); *Sears v. Likens*, 912 F.2d 889, 892-93 (7th Cir. 1990) (same). *But see In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 315 (8th Cir. 1997) (holding that

"Rule 9(b) does not apply to claims under § 11of the Securities Act, because proof of fraud or mistake is not a prerequisite to establishing liability under § 11"). Nevertheless, we decline to affirm on this alternate ground and instead leave the application of Rule 9(b) standards to the district court.

IV. CONCLUSION

In sum, we **AFFIRM** the district court's dismissal of the § 10(b), § 20(a), and Rule 10b-5 claims, as well as the denial of Alaska Electrical's motion to intervene. However, we **REVERSE** the dismissal of the § 11 claim and **REMAND** the case to the district court for further proceedings.

APPENDIX E

Effective: November 3, 1998

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures (Refs & Annos)
Subchapter I. Domestic Securities (Refs & Annos)

→→ § 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration

statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not

knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof--

> **(1)** that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or
>
> **(2)** that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration state-

ment had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements there-

in not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was

> an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the

security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit,

including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC. *et al.*,

Petitioner,

—v.—

THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND and THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEVIN L. MURPHY
GRAYDON HEAD
& RITCHEY, LLP
2400 Chamber Center Drive,
Suite 300
Fort Mitchell, Kentucky 41017
(859) 282-8800

DARREN J. ROBBINS
ERIC ALAN ISAACSON
(*Counsel of Record*)
erici@rgrdlaw.com
HENRY ROSEN
STEVEN F. HUBACHEK
AMANDA M. FRAME
ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway,
Suite 1900
San Diego, California 92101
(619) 231-1058

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, provides an express remedy for purchasers of a registered security if the security's registration statement "contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading."

Omnicare, Inc. issued securities pursuant to a registration statement asserting that the provider of pharmaceuticals to elderly residents of long-term care facilities believed that it operated within the law – when in truth Omnicare operated by paying and receiving illegal kickbacks, illegally promoting products such as Johnson & Johnson's Risperdal for dangerous off-label uses, and submitting false claims to Medicaid and Medicare. To settle governmental claims against it, Omnicare eventually paid roughly $150-million (plus interest), agreeing to enter a five-year corporate-integrity rehabilitation program.

Asserting that the legality of Omnicare's conduct – including kickbacks, fraudulent billing, and promotion of pharmaceuticals for unauthorized off-label use – amounts merely to a matter of "opinion," Petitioners ask this Court to decide:

"For purposes of a Section 11 claim, may a plaintiff plead that a statement of opinion was 'untrue' merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false – requiring allegations that the speaker's actual opinion was different from the one expressed – as the Second, Third, and Ninth Circuits have held?"

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Omnicare, Inc. ("Omnicare"), Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, the estate of the late Edward L. Hutton, and Sandra E. Laney.

Respondents are the Laborers District Council Construction Industry Pension Fund and the Cement Masons Local 526 Combined Funds.

In addition to the above-listed parties, Indiana State District Council of Laborers and Hod Carriers Pension Fund was originally a named plaintiff in the district court.

Pursuant to Supreme Court Rule 29.6, Respondents disclose that neither the Laborers District Council Construction Industry Pension Fund nor the Cement Masons Local 526 Combined Funds has a parent corporation, issues stock, or is owned or controlled by a publicly traded corporation.

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STATEMENT OF THE CASE

I. Nature of the Case

This case concerns Petitioners' liability under §11 of the Securities Act of 1933 ("Securities Act" or "1933 Act"), for issuing Omnicare, Inc. securities in a December 2005 public offering pursuant to a Registration Statement that described Omnicare as a company that operates within the law to provide pharmaceutical products and services that are carefully tailored to elderly patients' needs.

The truth was otherwise. The nation's largest provider of pharmaceutical-care services for elderly residents of long-term care facilities was in fact paying and receiving illegal kickbacks, systematically switching patients from suitable medications to more expensive (and thus more lucrative) pharmaceutical products, illegally promoting unapproved off-label uses of dangerous psychoactive drugs, and submitting false claims for reimbursement to Medicaid and Medicare. Omnicare engaged with Johnson & Johnson, in particular, in an unlawful program of bribes and kickbacks, while illegally promoting Johnson & Johnson's Risperdal for inappropriate and unapproved off-label uses, despite the grave risks posed to elderly patients' health. *See infra* at 5-12.

Caught red-handed in systematic misconduct, Omnicare eventually entered settlements with federal and state authorities. One made Omnicare "pay $98 million plus interest . . . to the federal government and the participating states and the District of Columbia," and required Omnicare to enter a rehabilitative five-year "Amended and Restated Corporate Integrity Agreement (CIA) with the

Department of Health and Human Services," which entailed "training and oversight to demonstrate Omnicare's commitment to comply with the applicable laws and regulations governing pharmacies." R138-6(Omnicare press release). A Department of Justice ("DOJ") press release explained that the settlement "provide[s] for procedures and reviews to be put in place to avoid and promptly detect conduct similar to that which gave rise to these matters." R134-5(TAC Ex.5, DOJ Press Release).

Omnicare has acknowledged that another settlement resolved "billing issues under the Michigan Medicaid program" by requiring Omnicare to "pay approximately $49.0 million to the State of Michigan." R59-17(Omnicare press release).

More recently, the DOJ announced that Johnson & Johnson too has entered settlements – paying $2.2 billion to resolve both criminal and civil claims against it for, among other things, promoting Risperdal for impermissible off-label uses, and for paying kickbacks inducing Omnicare to submit false claims to federal healthcare programs. *See infra* 10-12.

Investors who acquired Omnicare's registered securities issued pursuant to the December 2005 Registration Statement, with its misleading description of Omnicare's operation, sought relief under §11(a)'s provision that anyone acquiring a registered security may sue if "any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or

necessary to make the statements therein not misleading." 15 U.S.C. §77k(a).

This Court holds that §11 imposes strict liability on the security's issuer, if its registration statement is in any material respect incomplete or misleading: "Liability against the issuer of a security is virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976) ("the issuer of the securities is held absolutely liable").

Other defendants against whom §11 authorizes suit include every person who signed the registration statement or was a director of the issuer, 15 U.S.C. §77k(a)(1), (2), as well as "every underwriter with respect to such security," 15 U.S.C. §77k(a)(5), and every "accountant, engineer, or appraiser," or other professional who provides an expert opinion and with its consent was "named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement." 15 U.S.C. §77k(a)(4).

Defendants other than the issuer – which remains strictly liable – may avoid liability by pleading and proving an affirmative defense of "due diligence," requiring each to demonstrate that it "had, after reasonable investigation, reasonable ground to believe and did believe" that what the registration statement said was "true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(b)(3); *see Huddleston*, 459 U.S. at 382; *Hochfelder*, 425 U.S. at

208; *see Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 369 (5th Cir. 2001) ("this is an affirmative defense that must be pleaded and proved").

This Court's precedents interpreting §11 thus clearly hold that the issuer is strictly liable if a registration statement contains materially misleading statements, while other defendants bear the burden of proving as an affirmative defense that each both believed the statements made and after diligent investigation actually had a reasonable basis for that belief. *See Huddleston*, 459 U.S. at 382; *Hochfelder*, 425 U.S. at 208.

Though their principal brief below did not even cite it, Petitioners now contend that this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), holding that corporate directors' subjectively false statements of opinion or belief must be objectively misleading to be actionable under §14(a) of the Securities Exchange Act of 1934 ("Securities Exchange Act" or "1934 Act"), somehow should have compelled the Sixth Circuit to hold that plaintiffs seeking to state a 1933 Act §11 claim must plead and prove defendants' *subjective disbelief* in a registration statement's objectively misleading statements of opinion.

II. Statement of Facts[1]

Defendant Omnicare, whose stock trades publicly on the New York Stock Exchange under the symbol OCR, is the country's largest provider of pharmaceutical-care services to elderly patients of long-term care facilities ("LTCFs"), servicing more than 1.4 million LTCF patients nationwide. R134(TAC¶¶2-3, 16). But Omnicare's mode of conducting business, when the Registration Statement for its December 2005 registered offering became effective, was seriously at odds with the picture painted by the Registration Statement. The Registration Statement falsely told prospective investors that the company soliciting their money operated within the law, serving the needs of elderly patients in LTCFs. In truth, Omnicare generated its revenues by systematically switching patients to more-expensive pharmaceutical products whether or not in the patients' interest, by illegally promoting pharmaceuticals' dangerous off-label uses, by taking unlawful kickbacks for promoting pharmaceuticals – in direct violation of the Federal Anti-Kickback statute – and by submitting false claims to Medicare and Medicaid. R134(TAC¶¶4-11).

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[1] This Statement of Facts is based on the operative complaint's allegations which, on a motion to dismiss, must be taken as true, along with materials that are properly subject to judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007). Though the pleading was styled as the "Second Amended Complaint," *see* R134("Second Amended Complaint"), the district court subsequently dubbed it a "Third Amended Complaint" or "TAC." Pet. App. at 31a n.2. This brief employs the district court's preferred terminology.

The Registration Statement falsely represented that Omnicare operated by ethically and lawfully pursuing elderly patients' best interests.[2] In truth, Omnicare's so-called "therapeutic initiatives" were designed not to benefit LTCF patients, but rather to switch them from effective but inexpensive low-profit pharmaceuticals to far more-expensive high-profit drugs – overriding the patients' real interests in order to inflate Omnicare's reimbursements from payors such as Medicare and Medicaid. R134(TAC¶¶29-45). David Kammerer, who was Omnicare's Director of Medicaid Reimbursements until 2002, has reported that his duties included generating profit forecasts based on "how much Omnicare market share could be moved from one drug (or drug form) to another drug (or drug form)." R134(TAC¶31). A former executive assistant in Omnicare's Midwest Regional Headquarters between 1998 and 2005 has reported that Omnicare's CFO directed the creation of bogus "clinical case studies" to justify switching patients to

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[2] For example, Omnicare told investors that through its Pharmacy Services division, "in accordance with our pharmaceutical care guidelines, we also provide for patient-specific therapeutic interchange of more efficacious and/or safer drugs for those presently being prescribed," and that Omnicare's consultant pharmacists offered "monthly drug regimen reviews for each resident in the facility to assess the appropriateness and efficacy of drug therapies." R134(TAC¶¶10, 27). Omnicare said its consultant physicians offered "monthly drug regimen reviews for each resident in the facility to assess the appropriateness and efficacy of drug therapies, including a review of the resident's current medication usage, monitoring drug reactions to other drugs or food, monitoring lab results and recommending alternate therapies, dosing adjustments or discontinuing unnecessary drugs." R134(TAC¶27).

the more-expensive drugs. R134(TAC¶34). According to Kammerer, moreover, Omnicare falsely instructed its pharmacists and physicians that the more-profitable drugs had equal or superior efficacy, and offered cost savings for the ultimate payors.[3]

The Registration Statement prominently featured Omnicare's misleading assertions that "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements," and that "our contract arrangements with other healthcare providers . . . are in compliance

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[3] R134(TAC¶37). Omnicare's "Ranitidine Initiative," for example, was designed to needlessly switch patients to a more-expensive form of the drug Ranitidine, the second-most-prescribed drug to LTCF patients. R134(TAC¶¶40-45). Kammerer developed spreadsheets showing that Omnicare's profitability could be increased by switching patients' prescriptions from inexpensive tablets to much more-expensive capsules, in order to evade the price limit imposed on tablets by the federal Health Care Financing Administration, now known as the Center for Medicare and Medicaid Services. R134(TAC¶¶40-41). Though the tablets' price was regulated, the capsules' price was not, as capsules were rarely prescribed, generally being needed only for patients who are intubated. R134(TAC¶41). Bernard Lisitza, a licensed pharmacist and supervisor at Omnicare's Jacobs Healthcare between 1992 and 2001, reports that Omnicare instructed clerical personnel to alter prescriptions and to enter the altered orders on patients' Physician Order Sheets, which their doctors would sign off on without noticing the change. R134(TAC¶¶42-43). Lisitza has estimated that switching patients to the more-expensive capsules produced two to four times the revenue that Omnicare should have received from Ranitidine sales. R134(TAC¶¶38, 41).

with applicable federal and state laws." R134(TAC¶46). The TAC details how those contracts in fact violated the federal Anti-Kickback Statute, 42 U.S.C. §1320a-7b(b), which prohibits payments to induce the purchase – or even the recommendation – of pharmaceuticals to be paid for by a federally funded health-care program. R134(TAC¶¶47-90). The TAC sets out particularized allegations, identifying specific companies involved, and the products for which Omnicare arranged to receive illegal kickbacks. *E.g.*, R134(TAC¶¶77-90).

Violations of the Anti-Kickback Statute can have serious consequences, including legal liability. Violators also are potentially subject to exclusion from participation in federal healthcare programs, such as Medicaid and Medicare. R134(TAC¶50). State laws, moreover, condition Medicaid reimbursements on certifications of legal compliance. R134(TAC¶50).

The Registration Statement affirmatively (but falsely) advised investors that Omnicare conducted its business in a lawful and ethical manner, asserting that its consultant pharmacist services "help clients comply with the federal and state regulations applicable to nursing homes," rendering particular "assistance to the nursing facility in complying with state and federal regulations as they pertain to drug use." R134(TAC¶91). Yet, Omnicare was in truth violating the Federal Anti-Kickback Statute, working with pharmaceutical manufacturers to promote drugs for off-label use in violation of the Food, Drug and Cosmetic Act, working with pharmaceutical manufacturers to evade "Best Price" detection in violation of the Medicaid Drug Rebate Statute, and violating the federal False Claims Act with

fraudulently inflated billings to Medicare and Medicaid. R134(TAC¶¶92-98).

Omnicare arranged with Johnson & Johnson, in particular, to promote Risperdal – a powerful and dangerous atypical antipsychotic drug – for off-label use that the FDA had specifically rejected. R134(TAC¶¶6-8, 67-71). Because only 1% of the elderly population suffers *from schizophrenia*, for the treatment of which Risperdal had FDA approval, Omnicare and Johnson & Johnson together implemented an initiative promoting the dangerous antipsychotic for far more extensive unapproved off-label use by patients suffering *from dementia* – thereby violating FDA regulations and endangering LTCF patients. R134(TAC¶¶7, 69). Omnicare's off-label promotion of Risperdal was linked to increased incidence of cerebrovascular adverse events among those patients, including stroke and death. R134(TAC¶7).

Omnicare's misconduct with Johnson & Johnson resulted in *qui tam* complaints on behalf of the United States against Omnicare, R134(TAC¶5), and against Johnson & Johnson. R134(TAC¶¶6-7).

The TAC details how Omnicare eventually entered a settlement with the DOJ to resolve extensive allegations of wrongdoing, by attaching (and thus incorporating by reference) the DOJ's press release describing how Omnicare had systematically "solicited or paid a variety of kickbacks." R134-5(TAC Ex.5, DOJ Press Release). The DOJ explained that Omnicare had, for example, "allegedly solicited and received kickbacks from a pharmaceutical manufacturer, Johnson & Johnson (J&J), in exchange for agreeing to recommend that physicians prescribe Risperdal, a J&J antipsychotic drug, to nursing home

patients." R134-5(TAC Ex.5). "J&J's kickbacks to Omnicare took multiple forms, including rebates that were conditioned on Omnicare engaging in an 'Active Intervention Program' for Risperdal and payments dispensed as data purchase fees, educational grants, and fees to attend Omnicare meetings." *Id.*

Omnicare's illegal conduct had by no means ended there. "The government further alleged that Omnicare regularly paid kickbacks to nursing homes," and also "that Omnicare solicited, and IVAX paid, $8 million in kickbacks in exchange for Omnicare's agreement to purchase $50 million in drugs from IVAX." *Id.*

"'The defendants broke the law to take advantage of our nation's most vulnerable citizens – the elderly and the poor,'" explained the Assistant Attorney General for the DOJ's Civil Division. *Id.* And taxpayers had to foot the bill, through programs such as Medicare and Medicaid.

Although it is not part of the record below, this Court may judicially notice the fact that Johnson & Johnson on November 4, 2013, entered settlements totaling $2.2 billion that covers its misconduct with respect to Risperdal and payment of illegal kickbacks to Omnicare.[4]

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[4] The DOJ's November 4, 2013, press release and the terms of the settlements it describes are a matter of public record and are available online. *See* http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html (DOJ press release) (last visited Jan. 6, 2014); http://www.justice.gov/opa/jj-pc-docs.html (links to court filings) (last visited Jan. 6, 2014). That courts may judicially notice public documents and court records is well established. *See United States v. Pink*, 315 U.S. 203, 216 (1942) (noticing record

The DOJ announced on November 4, 2013, that "healthcare giant Johnson & Johnson (J&J) and its subsidiaries will pay more than $2.2 billion to resolve criminal and civil liability," for promoting Risperdal (and two other drugs) "for uses not approved as safe and effective by the Food and Drug Administration (FDA)," and also for "payment of kickbacks to physicians and to the nation's largest long-term care pharmacy provider" – that is, to Omnicare.[5] "The civil settlement also resolves allegations that, in furtherance of their efforts to target elderly dementia patients in nursing homes, J&J and Janssen paid kickbacks to Omnicare, Inc., the nation's largest pharmacy specializing in dispensing drugs to nursing home patients."[6] The DOJ explained that J&J and its Janssen subsidiary "have agreed to pay $149 million to resolve the government's contention that these kickbacks caused Omnicare to submit false claims to federal health care programs," noting that "[i]n 2009, Omnicare paid $98 million to resolve its civil liability for claims that it accepted kickbacks from J&J and Janssen, along with certain other conduct."[7]

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in another proceeding); *see also United States v. Louisiana*, 363 U.S. 1, 12-13 (1960) (noticing "a massive array of historical documents"). Courts may take judicial notice in connection with a Rule 12(b)(6) motion. *Tellabs*, 551 U.S. at 322-23.

5 United States DOJ press release, *Johnson & Johnson to Pay More than $2.2 Billion to Resolve Criminal and Civil Investigations*, Nov. 4, 2013, available online at http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html (last visited Jan. 6, 2014).

6 *Id.*

7 *Id.*

Petitioners nonetheless insist that the December 2005 Registration Statement's assurances concerning the character and legality of Omnicare's operation were merely a matter of "opinion," and that what the Registration Statement said cannot be deemed materially misleading under §11 absent allegations demonstrating each defendant's personal subjective knowledge of falsity.

III. The Proceedings Below

A. From Filing Through Initial Appeal

This litigation began in 2006, with the filing of class-action complaints alleging scienter-based securities-fraud claims under 1934 Act §10(b), 15 U.S.C. §78j(b), and was styled as "a securities fraud class action on behalf of all purchasers of the publicly traded securities of Omnicare, Inc. . . . between August 3, 2005 and January 27, 2006." R1(Complaint ¶1).

Consolidating two related cases, the district court appointed Laborers District Council to serve as Lead Plaintiff, under the procedures implemented by the Private Securities Litigation Reform Act of 1995 ("PSLRA") as codified in 1934 Act §21D(a)(3)(A), 15 U.S.C. §78u-4(a)(3)(A), and in 1933 Act §27(a)(3)(A), 15 U.S.C. §77z-1(a)(3)(A). R22(Order). The Lead Plaintiff then filed a Consolidated Amended Complaint ("CAC"), on July 20, 2006, still asserting claims only "for violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934." R27(CAC ¶1).

The district court granted leave on January 26, 2007, R51(Order), to file what was captioned as the "First Amended Consolidated Complaint" ("FACC"),

that added the Cement Masons Local 526 Combined Funds as an additional named plaintiff, and that asserted a further claim under the strict-liability provision of 1933 Act §11, 15 U.S.C. §77k, on behalf of those putative class members who had acquired shares issued pursuant to Omnicare's December 2005 registered offering. R52(FACC¶¶1, 33, 249-256).

On defendants' motion, the district court dismissed that complaint with prejudice. R93(Order) at 29, *reported as Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 527 F. Supp. 2d 698, 712 (E.D. Ky. 2007). After setting forth the special statutory pleading requirements for 1934 Act §10(b) claims, the district court proceeded to dismiss *both* fraud-based 1934 Act claims *and* strict-liability 1933 Act claims on the ground that plaintiffs had not pleaded the elements of *prima facie* liability under 1934 Act §10(b). R93(Order) at 9-26 & n.8.

Although neither scienter nor loss causation is an element of *prima facie* liability for the §11 claims, the district court in a footnote dismissed them on the basis that Respondents had not pleaded the loss-causation element necessary to state a *prima facie* claim for intentional securities fraud under §10(b). R93(Order) at 17 n.8.

The district court also dismissed 1934 Act §10(b) claims based on statements concerning Omnicare's legal-compliance policies which had appeared outside Omnicare's 1933 Act Registration Statement, in a news article and press release, and which therefore were not asserted as 1933 Act claims. R93(Order) at 21-26. The district court dismissed those §10(b) securities-fraud claims because "plaintiffs do not plead facts which support an inference that defendants knew these two statements to be false at

the time they were made," R93(Order) at 23-24, and entered judgment. R94(Judgment).

The Sixth Circuit affirmed the district court's dismissal of 1934 Act §10(b) claims for which investors must plead facts showing both scienter and loss causation. Pet. App. at 42a-67a. But it reversed the district court's dismissal of 1933 Act claims, because loss causation is not an element of *prima facie* liability for a 1933 Act claim, but rather a potential affirmative defense. Pet. App. at 66a-67a. Holding that Rule 9(b) applies to any allegations of fraud that may underlie §11 claims, the Sixth Circuit remanded, leaving "the application of Rule 9(b) standards to the district court." Pet. App. at 67a.

B. On Remand: Dismissal of Strict-Liability §11 Claims for Failure to Plead Particularized Facts Demonstrating Each Defendant's Knowledge of Falsity

On remand, the district court granted Respondents leave to file a further amended complaint that dropped fraud-based 1934 Act allegations and focused exclusively on stating strict-liability 1933 Act claims for the December 2005 Registration Statement's false and misleading statements and omissions. *See* R133:9(Order). The TAC drew on government investigations, other court proceedings, settlements of governmental claims, and confidential witnesses. R134(TAC¶¶4-11, 26-167).

The district court dismissed plaintiffs' §11 claims with prejudice, however, on the ground that plaintiffs failed to particularize facts demonstrating each

defendant's knowledge of falsity. Pet. App. at 28a-41a.

Although a defendant's state of mind is not an element of §11 liability, *see Huddleston*, 459 U.S. at 382, and although Rule 9(b) expressly permits state of mind to be "alleged generally," the district court held that when misleading statements of opinion are at issue, §11 plaintiffs must plead particularized facts demonstrating each defendant's subjective disbelief of the statements made. *See* Pet. App. at 34a-35a.

It then dismissed Respondents' strict-liability 1933 Act §11 claims on the ground that the TAC did not particularize facts demonstrating each defendant's fraudulent intent. Pet. App. at 35a-37a (dismissing allegations of accounting violations); Pet. App. at 38a-40a (dismissing allegations relating to legal compliance).

Asserting that "statements regarding a company's belief as to its legal compliance are considered 'soft' information and are generally not actionable," Pet. App. at 38a, the district court held that absent allegations demonstrating each defendant's personal knowledge of falsity, 1933 Act §11 liability cannot attach to the Registration Statement's misleading statements and omissions relating to the conduct, character, and legality of Omnicare's business operations. Pet. App. at 38a-40a. Saying it found no basis for "inferring that the company's officers knew they were violating the law," the district court dismissed the strict-liability claims with prejudice. Pet. App. at 39a.

C. The Sixth Circuit Sustains Respondents' §11 Claims Because Knowledge of Falsity is Not an Element of *Prima Facie* Liability

The Sixth Circuit reversed in substantial part the district court's dismissal of Respondents' strict-liability §11 claims, observing that the district court had erroneously "held that Plaintiffs were required to plead that Defendants knew that the statements of legal compliance were false at the time they were made." Pet. App. at 11a. "Because the court found that Plaintiffs failed to plead knowledge of falsity, it dismissed the complaint for failure to state a claim." Pet. App. at 11a.

Following this Court's decision in *Huddleston*, 459 U.S. at 381-82, the Sixth Circuit reversed because "Section 11 provides for strict liability, and does not require a plaintiff to plead a defendant's state of mind." Pet. App. at 12a.

"Section 10(b) and Rule10b-5 require a plaintiff to prove scienter," the Sixth Circuit observed, while "§11 is a strict liability statute." Pet. App. at 15a. Thus, if a registration statement "includes a material misstatement," or is otherwise materially misleading, "that is sufficient" to state a *prima facie* claim, "and a complaint may survive a motion to dismiss without pleading knowledge of falsity." Pet. App. at 16a.

The Sixth Circuit noted that citing this Court's *Virginia Bankshares* decision on liability under 1934 Act §14(a), the Second Circuit in *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), had

> held "when a plaintiff asserts a claim under section 11 . . . based upon a belief

> or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Id.* at 110 (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991)).

Pet. App. at 16a (quoting *Fait*, 655 F.3d at 111).

The Sixth Circuit concluded that to the extent that the Second Circuit's decision in *Fait*, and Ninth Circuit's in *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009), might be read to require plaintiffs to allege each defendant's subjective knowledge of falsity or disbelief in order to state a §11 claim, they "have read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this §14(a) case into a §11 context." Pet. App. at 17a.

The Sixth Circuit explained: "Reserving the question of whether scienter is necessary to make out a §14(a) claim, the Supreme Court held in *Virginia Bankshares* that a plaintiff may bring a claim under §14(a) of the Securities Exchange Act of 1934 for a material misstatement or omission even if the statement is vague and conclusory." Pet. App. at 17a. "The Court furthermore held that a defendant's disbelief in his own statement is not enough, on its own, for a plaintiff to make out a claim for a material misstatement under §14(a)." Pet. App. at 17a. A §14(a) claimant must "plead objective falsity in order to state a claim; pleading belief of falsity alone is not enough." Pet. App. at 17a.

"In the instant case, the Plaintiffs have pleaded objective falsity," the Sixth Circuit observed. Pet. App. at 17a. "The *Virginia Bankshares* Court was not faced with and did not address whether a plaintiff must additionally plead knowledge of falsity in order to state a claim" under §14(a), let alone under 1933 Act §11, which expressly imposes liability whenever a registration statement contains a false or misleading statement. Pet. App. at 17a.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to decide whether a §11 plaintiff may "plead that a statement of opinion was 'untrue' merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false – requiring allegations that the speaker's actual opinion was different from the one expressed" – that is to say, that the defendants actually disbelieved the opinion expressed. But this Court's review is unwarranted.

Petitioners suggest the decision below conflicts with this Court's holding in *Virginia Bankshares*, a decision that their merits brief below did not even cite, and which does not address 1933 Act liability, but merely holds that false expressions of opinion must be objectively misleading in order to be actionable under 1934 Act §14(a). In *Virginia Bankshares*, this Court *assumed* that the 1934 Act defendants subjectively disbelieved their own representations that a proposed merger was "fair," and the value obtained "high." This Court then held that statements must be *objectively misleading* – not merely subjectively disbelieved – to impose liability under §14(a). But if statements are objectively

misleading, §11's statutory standard of liability is satisfied – whether or not any particular defendant personally disbelieved them. 15 U.S.C. §77k(a); *Huddleston*, 459 U.S. at 382. *Virginia Bankshares* never suggests, let alone holds, that an objectively misleading statement of opinion cannot be actionable under §11 unless each defendant's subjective disbelief in the statement is also alleged. *Infra* at 20-26.

Though the Sixth Circuit's decision in this case says it departs from decisions of the Second and Ninth Circuits, the possibility of nascent conflict does not warrant this Court's premature intervention. The entire conflict comes down to a single sentence unaccompanied by real analysis in the Ninth Circuit's decision in *Rubke*, and the Second Circuit's singularly garbled opinion in *Fait*. Other Second Circuit decisions clearly hold that statements of opinion may be materially misleading, and thus actionable under the 1933 Act, "no matter how honestly but mistakenly held." *Franklin Sav. Bank v. Levy*, 551 F.2d 521, 527 (2d Cir. 1977). While the Second Circuit may need to resolve confusion about what contradictory statements in *Fait* really mean, this Court's immediate attention would be premature. *Infra* at 26-32.

In the meantime, the lower courts can be expected to continue to apply §11's text as written, and to follow this Court's decisions in *Huddleston* and *Hochfelder*, just as the Sixth Circuit has done. Given the clarity of §11's text, and of this Court's opinions concerning its meaning, the likelihood of serious conflict developing seems remote. *Infra* at 32-35.

This case is, moreover, a poor vehicle for resolving whatever problems *Fait* might conceivably pose. For

one thing, Respondents allege sufficient facts to infer the subjective disbelief of at least three defendants: Omnicare, its CEO Joel F. Gemunder, and its CFO David W. Froesel. *Infra* at 35-36. Perhaps more important, this case presents little opportunity for reviewing and correcting *Fait*'s suggestion that an issuer may be insulated from liability for its false and misleading financial statements absent allegations showing its subjective disbelief in the accuracy of financial results it reports. Accounting rules often require the exercise of judgment, and audited financial results are accompanied by an "audit opinion." But in this case no auditor is named as a defendant, and the Sixth Circuit has *affirmed* dismissal of Respondents' claims of accounting violations. Alleged "accounting-based misstatements" thus are, Petitioners themselves concede, "not pertinent to this petition." Pet. at 4 n.1. This case thus presents a remarkably poor vehicle for addressing whatever problems the Second Circuit's opinion in *Fait* might hypothetically engender. *Infra* at 35-37.

I. The Petition is Grounded in a Misreading of *Virginia Bankshares*

The Petition is grounded in a misreading of *Virginia Bankshares*, a decision that Petitioners did not even cite in their principal brief below, and which holds that in the context of formal securities filings, statements of opinion "are reasonably understood to rest on a factual basis that justifies them as accurate, *the absence of which renders them misleading*." *Virginia Bankshares*, 501 U.S. at 1093 (emphasis added).

Petitioners attribute to *Virginia Bankshares* an entirely different holding, asserting:

> The Court concluded that such a statement is actionable only as "a misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. To establish that such a statement was a material misstatement, therefore, the plaintiff must show that the speaker in fact "did not hold the beliefs or opinions expressed." *Id.* at 1090.

Pet. at 1. But that clearly is *not* what *Virginia Bankshares* held. As a matter of fact, this Court *expressly disclaimed* any ruling that subjective knowledge of falsity is required to support a §14(a) claim, *Virginia Bankshares*, 501 U.S. at 1091 n.5, and its opinion emphasizes that a specific statement may be either "knowingly false *or* misleadingly incomplete, even when stated in conclusory terms." *Id.* at 1095 (emphasis added).

Virginia Bankshares involved claims under 1934 Act §14(a), and the defendants' subjective disbelief in the opinions they had expressed was assumed because it had been proved below to a jury's satisfaction. This Court explained that a jury had found "that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made." *Virginia Bankshares*, 501 U.S. at 1090. This Court confined itself to those facts – expressly reserving "the question [of] whether scienter was necessary" to

state a §14(a) claim. *Id.* at 1091 n.5. The question to be decided was whether the statements might be actionable under §14(a) even if they were not *objectively* misleading.

With subjective falsity or scienter assumed, this Court held that where a statement of belief or opinion is at issue, a defendant's mere subjective "disbelief or undisclosed motivation, standing alone, [is] insufficient" for §14(a) liability. *Virginia Bankshares*, 501 U.S. at 1096. Statements of opinion must be *objectively misleading* to be actionable. *See id.* This Court clearly did not hold that an objectively misleading statement of opinion cannot be actionable under §14(a), let alone that it cannot be actionable under §11's strict-liability standard, absent a showing of subjective falsity or scienter.

Virginia Bankshares never suggests that if statements are in fact objectively misleading, investors must *also* allege defendants' subjective disbelief to state a strict-liability 1933 Act claim. The decision very clearly states that in the context of formal securities-law filings, statements of opinion "are reasonably understood to rest on a factual basis, that justifies them as accurate, the absence of which renders them misleading." *Virginia Bankshares*, 501 U.S. at 1093. And §11 very clearly imposes liability if a registration statement "contained an untrue statement" or omitted any material fact "necessary to make the statements therein not misleading." 15 U.S.C. §77k(a).

Virginia Bankshares does not purport to insert a new state-of-mind requirement in §11's text, which by its express terms requires anyone invoking its due-diligence defense to "sustain the burden of proof" that

each "had, after reasonable investigation, reasonable ground to believe and did believe," when the registration statement became effective, "that the statements therein were true and there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading."[8] Neither does *Virginia Bankshares* purport to reverse the burden of pleading and proving this affirmative defense, which the statute squarely places on the shoulders of any defendant who chooses to invoke it.[9]

Virginia Bankshares does not purport to overrule 1933 Act precedents, such as *Hochfelder* and *Huddleston*, which hold that §11 imposes strict liability on a security's issuer, while placing on other defendants the burden of pleading and proving that each both actually believed what the registration statement said *and* had reasonable grounds for so believing. *Huddleston*, 459 U.S. at 382; *Hochfelder*, 425 U.S. at 208.

Nor does *Virginia Bankshares* disparage the numerous precedents, arising from many contexts, confirming that opinions can be objectively misleading, and thus potentially actionable, absent

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[8] 15 U.S.C. §77k(b)(3)(A) (emphasis added). *See generally* 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* §7.4[2], at 239-41 (6th ed. 2009).

[9] *See* 15 U.S.C. §77k(b)(3). This Court's precedents preclude shifting to plaintiffs the burden of pleading facts in avoidance of such a defense. *See, e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980).

allegations of scienter. Accountants may be liable for negligent audit opinions.[10] Appraisers may be liable for negligent opinions as to value.[11] Lawyers, too, may be liable for professional negligence if they offer a false opinion on a point of law.[12]

The Restatement (Second) of Torts confirms that opinions may be negligently misleading. Section 552, for example, provides that one with a pecuniary interest who "supplies false information for the guidance of others in their business transactions" may be liable "if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) of Torts §552(1)

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[10] *See, e.g., Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP*, 542 F.3d 475, 481-84 (5th Cir. 2008) (Mississippi common law); *Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs*, 455 F.2d 847, 848-53 (4th Cir. 1972) (Rhode Island law); *Fullmer v. Wohlfeiler & Beck*, 905 F.2d 1394, 1395-96 (10th Cir. 1990) (Utah law); *Touche Ross & Co. v. Comm. Union Ins. Co.*, 514 So. 2d 315, 322 (Miss. 1987); *Shatterproof Glass Corp. v. James*, 466 S.W. 2d 873, 874-80 (Tex. Civ. App. 1971).

[11] *See, e.g., Private Mortgage Inv. Servs. v. Hotel & Club Assocs.*, 296 F.3d 308, 315 (4th Cir. 2002) (South Carolina common law); *FSLIC v. Texas Real Estate Counsellors*, 955 F.2d 261, 265 & n.6 (5th Cir. 1992) (Texas law); *Levine v. Wiss & Co.*, 478 A.2d 397, 247-48 (N.J. 1984); *Costa v. Neimon*, 366 N.W. 2d 896, 898 (Wis. Ct. App. 1985).

[12] *See, e.g., Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 192 F. Supp. 2d 852, 873-74 (N.D. Ill. 2002); *Crossland Sav. FSB v. Rockwood Ins. Co.*, 700 F. Supp. 1274, 1284 (S.D.N.Y. 1988).

(1977). This "applies not only to information given as to the existence of facts *but also to an opinion given upon facts* equally well known to both the supplier and the recipient."[13]

A statement of opinion clearly may be misleading, and thus actionable under §11, even if it was not subjectively disbelieved by the persons that the statute makes accountable for a registration statement's misleading statements and omissions.

Justice Scalia's *Virginia Bankshares* concurrence by no means suggests a different conclusion. Justice Scalia wrote that the directors' statement of opinion that a proposed merger provided "high value" was one that, under 1934 Act §14(a), "would not produce liability if in fact it was not a high value but the directors honestly believed otherwise." *Virginia Bankshares*, 501 U.S. at 1109. The Sixth Ciruit recognized it would be unreasonable to employ this concurring dictum on 1934 Act §14(a) liability, *from a case assuming that §14(a) may require scienter, see*

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[13] *Id.*, §552, cmt. b (emphasis added); *see, e.g., Private Mortgage*, 296 F.3d at 314; *Lawyers Title Ins. Corp. v. Baik*, 55 P.3d 619, 624 (Wash. 2002); *Milwaukee Partners v. Collins Eng.*, 485 N.W. 2d 274, 277 (Wis. Ct. App. 1992). Liability for negligent misrepresentation exists even "[w]hen there is no intent to deceive but only good faith coupled with negligence," as those who offer opinions to guide others are bound to exercise both honesty *and* due care. Rest. (Second) Torts § 552, cmts. a and i; *see, e.g., Gilchrist Timber Co. v. ITT Rayonier*, 696 So. 2d 334, 337 (Fla. 1997); *State ex rel. Nichols v. Safeco Ins. Co.*, 671 P.2d 1151, 1154 n.1 (N.M. App. 1983); *Merrill v. William E. Ward Ins.*, 622 N.E. 2d 743 (Ohio App. 1993); *Haberman v. WPPSS*, 744 P.2d 1032, 1067 (Wash. 1987).

supra at 21-22, to rewrite 1933 Act §11. Nothing in Justice Scalia's concurrence concerning the scope of implied liability under §14(a) suggests that the Court should disregard §11's clear text, which creates an express right of action and places on specific defendants the burden of demonstrating that they not only "did believe" the statements made, but also that they had a reasonable basis for that belief. 15 U.S.C. §77k(b)(3).

II. Ambiguity In Other Circuits' Decisions Raises No Clear Conflict Warranting this Court's Review

Petitioners emphasize that the Sixth Circuit's opinion below says it rejects decisions of the Second and Ninth Circuits that can be read to say statements of opinion are not actionable under §11 unless plaintiffs allege facts showing that the defendants subjectively disbelieved them. *See* Pet. App. at 16a. But the intercircuit conflict is neither so extensive, nor so clear, as Petitioners contend.

The Ninth Circuit's decision in *Rubke* surely affords no basis for this Court's immediate intervention, when it rather casually states that allegedly misleading opinions "can give rise to a claim under section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading." *Rubke*, 551 F.3d at 1162. The Ninth Circuit offers no reasoned analysis or rationale for this conclusory statement of an idea entirely at odds both with statutory text and with this Court's settled precedents.

Subsequent Ninth Circuit decisions adhere to this Court's holdings in *Huddleston* and *Hochfelder*, that 1933 Act claims do not require plaintiffs to allege defendants' subjective state of mind.[14] Resolving any resulting tensions in the Ninth Circuit's case law should be left to that court, given the paucity of analysis in *Rubke* and its lack of significant impact on subsequent decisions.

The Second Circuit's decision in *Fait*, concerning §11 claims based on allegedly misleading statements about an issuer's goodwill and loan-loss reserves, is altogether too muddled to produce a clear conflict requiring this Court's immediate attention. Acknowledging that under this Court's settled precedents "claims under sections 11 and 12 do not require allegations of scienter," the Second Circuit's opinion in *Fait* nonetheless asserts that statements concerning valuation of goodwill and the adequacy of required accounting reserves involve opinion, and thus can be actionable under §11 only if "both objectively false *and disbelieved* by the defendant at the time it was expressed." 655 F.3d at 109-10 (emphasis added).

The Second Circuit's analysis concerning valuation of goodwill is conceptually incoherent, asserting that a §11 claimant must "plausibly allege that defendants did not believe the statements regarding goodwill at the time they made them," while simultaneously

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[14] *See, e.g.*, *Hildes v. Arthur Anderson LLP*, 734 F.3d 854, 860 (9th Cir. 2013) ("Section 11 lacks a scienter requirement"); *Hemmer Grp. v. Sw. Water Co.*, No. 11-56154, 2013 U.S. App. LEXIS 11517, at *3-*4 (9th Cir. June 7, 2013) ("Section 11 is a strict liability statute and does not require fraudulent intent.").

insisting that this "does not amount to a requirement of scienter." *Id.* at 112 & n.5. This is puzzling, to say the least. For a defendant's subjective disbelief in its own statements amounts to knowing falsity. And the Second Circuit has long held that "'[t]he scienter needed in connection with securities fraud is intent to deceive, manipulate or defraud, *or knowing misconduct.*'" *Press v. Quick & Reilly Inc.*, 218 F.3d 121, 130 (2d Cir. 2000) (quoting *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999)) (emphasis added).

Fait's analysis concerning loan-loss reserves starts by indicating that the plaintiff failed to allege objective falsity: "Plaintiff does not point to an objective standard for setting loan loss reserves." 655 F.3d at 113. Yet the court then concludes: "Because the complaint does not plausibly allege subjective falsity, it fails to state a claim." *Id.* If the statements at issue were not objectively misleading, because no objective standards were violated, then there was no reason for the Second Circuit also to delve into whether they were subjectively misleading. And had there been sufficient facts to show objective falsity, the Second Circuit may well have found those facts sufficient for pleading subjective falsity, too.

As a consequence, *Fait* may be little more than a "one-off" decision. Other Second Circuit precedents clearly hold that statements of opinion may be actionably misleading under the 1933 Act, whether or not their makers genuinely believed them. In *Franklin Savings Bank*, 551 F.2d at 527, which involved claims under 1933 Act §12, 15 U.S.C. §77*l*, the Second Circuit held: "If Goldman, Sachs failed to exercise reasonable professional care in assembling and evaluating the financial data, particularly in view

of the worsening condition of Penn Central, then its representation that the paper was credit worthy and high quality was untrue in fact and misleading no matter how honestly but mistakenly held." And in *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715-16 (2d Cir. 2011), the Second Circuit held that defendants' alleged negligence relating solely to matters of opinion about known trends' likely future impact sufficiently stated a §11 claim.

Nor can Petitioners say that *Fait* has had much impact. Relatively few decisions have even cited it. The Second Circuit did so in a couple of nonprecedential summary orders, both lacking serious analysis of what *Fait* means.[15] Two published opinions that cite *Fait* involve claims arising under 1934 Act §10(b), for which knowledge of falsity or scienter is an element of liability, and thus cast little light on how *Fait* will be applied to strict-liability 1933 Act claims.[16] A single published decision involving 1933 Act claims, *Freidus v. Barclays Bank PLC*, 734 F.3d 132 (2d Cir. 2013), allows the plaintiff leave to replead on remand in order to meet *Fait*'s requirement that a statement of opinion be both objectively false *and* disbelieved by the defendant. *Id.*

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[15] *See, e.g.*, *Freidus v. ING Groep, N.V.*, No. 12-4514-cv, 2013 U.S. App. LEXIS 23489, at *4 (2d Cir. Nov. 22, 2013) (nonprecedential summary order); *Freeman Group v. Royal Bank of Scotland Group PLC*, No. 12-3642-cv, 2013 U.S. App. LEXIS 19571, at *7 (2d Cir. Sept. 25, 2013) (nonprecedential summary order).

[16] *Kleinman v. Elan Corp.*, 706 F.3d 145, 147, 153 (2d Cir. 2013); *City of Omaha Nebraska Civ. Empl. Ret. Sys. v. CBS Corp.*, 679 F.3d 64, 66-67 (2d Cir. 2012).

at 141. The decision notes *Fait*'s assertions "that allegations of disbelief of subjective opinions are not the same as allegations of fraud," *id.*, and that "the pleading required for beliefs and opinions 'does not amount to a requirement of scienter,'" *id.* (quoting *Fait*, 655 F.3d at 112 n.5).

But the Second Circuit has yet to explain how requiring a defendant's subjective disbelief in the truth *of its own* statements amounts to something other than requiring scienter. It should be permitted to do so before the issue demands this Court's attention.

Hoping to create the impression of a more extensive, and perhaps serious, precedential conflict, Petitioners say that in *In re Donald J. Trump Casino Secs., Litig.*, 7 F.3d 357 (3d Cir. 1993), the Third Circuit held that statements of opinion cannot be deemed misleading unless defendants subjectively disbelieved them. But this is what *Trump Casino* actually says:

> We have squarely held that opinions, predictions and other forward-looking statements are not *per se* inactionable under the securities laws. Rather, such statements of "soft information" may be actionable misrepresentations if the speaker does not genuinely *and reasonably* believe them.

Trump Casino, 7 F.3d at 368 (emphasis added).

The Third Circuit thus clearly contemplates liability may lie in §11 cases if statements were not

both "genuinely *and reasonably* believe[d]." *Id.* (emphasis added).

Reasonable belief clearly is a negligence standard, not a requirement that plaintiffs demonstrate each defendant's subjective disbelief concerning an offering document's representations. As this Court noted in *Hochfelder*, §11's "due diligence" affirmative defense implicates "a negligence standard," by requiring any defendant invoking it to show "that 'after reasonable investigation' he had 'reasonable ground[s] to believe' that the statements for which he was responsible were true and there was no omission of a material fact." *Hochfelder*, 425 U.S. at 208 (quoting 15 U.S.C. §77k(b)(3)). Again, the statute squarely places on defendants seeking to invoke this defense the burden of demonstrating that they both genuinely and reasonably believed what the Registration Statement said. *See id.*; 15 U.S.C. §77k(b)(3). It clearly does not make the defendants' subjective disbelief or knowledge of falsity an element of *prima facie* liability that plaintiffs must plead in order to state a claim.

Trump Casino notes that *Virginia Bankshares* "held that statements of opinion or belief may be actionable when they expressly or impliedly assert something false or misleading about their subject matter." *Trump Casino*, 7 F.3d at 372. Yet *Trump Casino* never interprets *Virginia Bankshares* to hold that when its requirement of objective falsity is satisfied, a plaintiff must *also* prove defendants' subjective disbelief to state a §11 claim. *Trump Casino* never suggests that defendants must subjectively disbelieve a registration statement's objectively misleading statements of opinion or belief

in order for those misleading statements to be actionable under §11.

In sum, although the Second Circuit's decision in *Fait* and the Ninth Circuit's decision in *Rubke* each unquestionably contains some confusing language, the job of clearing up what those decisions really mean is better left to the Second Circuit and Ninth Circuit – which should be afforded an opportunity to work through any dissonance that exists in their own decisions before this Court's intervention is required.

III. The Sixth Circuit's Opinion Comports with The 1933 Act's Statutory Text and With This Court's Decisions Interpreting that Text

Despite confusing statements in *Rubke* and *Fait*, other circuits can be expected to honor this Court's precedents, and to apply §11 as written – just as the Sixth Circuit has. The statutory text, and this Court's decisions concerning that text, are sufficiently clear that serious precedential conflict is unlikely to develop.

Petitioners breeze past §11's text, which imposes strict liability on an issuer of securities without regard to its state of mind, and which squarely places on others involved in the offering process (including the issuer's directors and anyone who signed the registration statement) the burden of demonstrating that each reasonably believed the registration statement contained no false or misleading statements. *See* 15 U.S.C. §77k(a), §77k(b)(3).

In framing express remedies under the federal securities laws, Congress "clearly specified whether recovery was to be premised on knowing or intentional conduct, negligence, or entirely innocent mistake." *Hochfelder*, 425 U.S. at 207. "For example, §11 of the 1933 Act unambiguously creates a private action for damages when a registration statement includes untrue statements of material facts or fails to state material facts necessary to make the statements therein not misleading." *Id.* at 207-08. "Within the limits specified by §11(e), the issuer . . . is held absolutely liable for any damages resulting from such misstatement or omission." *Id.* at 208. Others "such as accountants who have prepared portions of the registration statement are accorded a 'due diligence' defense." *Id.* "In effect, this is a negligence standard." *Id.* "The express recognition of a cause of action premised on negligent behavior in §11 stands in sharp contrast to the language of §10(b)," (*id.*), which imposes liability only if a defendant acted with scienter, "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 193 n.12; *see also Huddleston*, 459 U.S. at 381-82.

Though Petitioners say expressions of opinion cannot possibly be misleading unless their authors personally disbelieved them, the 1933 Act expressly requires defendants other than the issuer to show, as an affirmative defense, not only that they believed assertions in a registration statement – including any opinions and valuations – but also that they had a reasonable basis to so believe. A defendant other than the issuer must "sustain the burden of proof" that it had "after reasonable investigation, reasonable ground to believe and did believe . . . that the statements therein were true and that there was no

omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(b)(3)(A), (B). If the Registration Statement contains the "report or valuation of an expert" opining on the issuer's operations or assets, the affirmative defense requires defendants claiming to rely on the expert's opinion to demonstrate that each "had no reasonable ground to believe" that the statement of opinion was inaccurate or misleading. 15 U.S.C. §77k(b)(3)(C).

The statutory text makes no sense if, as Petitioners contend, such statements cannot be misleading in the first place absent a showing that specific defendants personally disbelieved them.

It is easy to imagine cases where an issuer's Chief Executive Officer or its Chief Financial Officer know that something a registration statement says is false, or misleadingly incomplete, and yet reasonably diligent underwriters and outside directors remain unaware of the falsity. In this case, for example, it might turn out at trial that Omnicare's CEO and CFO each knew that what the Registration Statement said about legal compliance was false. Yet, it is conceivable that an outside director still could carry the burden of demonstrating the affirmative defense – by showing that he or she remained innocently ignorant, and actually believed what the Registration Statement said.

According to Petitioners' views, then, it appears that one and the same statement would be both materially misleading, and *not* materially misleading, at the very same time, apparently depending on the subjective state of mind of each defendant. It is materially misleading to the extent that plaintiffs can

show the CEO or CFO disbelieved it. But it is *not* materially misleading because other defendants were unaware of the problem. This makes little sense. For as this Court has repeatedly stated, materiality must be judged "according to an objective standard," looking not to any defendant's state of mind, but focusing instead on "'the significance of an omitted or misrepresented fact to a reasonable investor.'" *Amgen Inc. v. Connecticut Retirement Plans & Tr. Funds*, 133 S. Ct. 1184, 1191, 1195-96 (2013) (quoting *TSC Indus., Inc. v. Northway Inc.*, 426 U.S. 438, 445 (1976)); *see Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011).

All in all, it is quite unlikely that any serious precedential conflict will develop in the circuit courts.

IV. This Is A Poor Test Case as at Least Three Defendants' Subjective Disbelief is Manifest from the Facts Alleged, and as the Case Presently Involves No Accounting Issues of the Sort Implicated by *Fait*

Were it necessary to wade into the issues hypothetically created by an extravagant reading of *Fait*, this case would be a poor vehicle for doing so.

For one thing, this case should survive even under a subjective-disbelief standard. If knowing falsity were truly §11's standard, the facts pleaded raise at least a plausible inference that Omnicare and its two top officers knew of Omnicare's misconduct. CEO Gemunder and CFO Froesel not only knew of Omnicare's undisclosed practices, they were directly involved in coordinating and implementing them, overseeing and orchestrating the execution of

therapeutic initiatives and contracts entailing illegal rebates.

Gemunder personally approved therapeutic initiatives designed to push high-profit drugs on nursing home patients, R134(TAC¶31), and Froesel was responsible for directing Omnicare's Regional CFOs to initiate measures to switch patients' prescriptions from lower-priced to higher-priced drugs. R134(TAC¶¶34-38). Gemunder personally told a Johnson & Johnson executive that Omnicare would support a therapeutic initiative to steer patients towards Risperdal by promoting the drug for off-label uses.[17] Corporate documents also reveal that Gemunder negotiated contracts providing the "rebates" Omnicare received for promoting manufacturers' drugs – including those related to Omnicare's Risperdal Initiative. R134(TAC¶¶51, 87-90 & Ex. 21 at JNJ011362-64). Gemunder also misled Omnicare's attorneys in order to get their "approval," or simply ignored the attorneys' advice concerning the transactions. R134(TAC¶¶87-90, 122, 124). Accordingly, Froesel and Gemunder, at least, likely knew that Omnicare's statements affirming the legality of Omnicare's practices were false.

Perhaps more important, Petitioners themselves concede that this case presents no opportunity to evaluate *Fait's* potential impact on cases involving misstated financial results. *Fait*, which involved alleged accounting violations, might arguably have seriously deleterious consequences were it broadly applied whenever a company's reported financial

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[17] R134(TAC¶¶67-71). The individual responsible for preparing "clinical spin," Lisa Welford, reported directly to defendant Gemunder. R134(TAC¶36 & Ex. 17 at JNJ351935).

results are based on accounting judgments, or when an auditor's report is framed as an "audit opinion."

The valuation of goodwill and the taking of reserves for doubtful accounts can directly affect a company's reported assets and earnings. Does *Fait* thus mean that when a company reports that it earned fifty cents a share, this is nothing more than an expression of opinion? Does *Fait* mean that when auditors consent to inclusion of an "audit opinion" in an issuer's registration statement, they cannot be liable unless plaintiffs allege and prove the auditors' subjective disbelief –thereby inverting §11(b)(3)'s provision that an auditor must demonstrate that it "had, after reasonable investigation, reasonable ground to believe and did believe" that its audit opinion was "true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading"? 15 U.S.C. §77k(b)(3)(B)(i); *see Hochfelder*, 425 U.S. at 208.

Depending on how the case law develops, those might turn out to be important questions. But this is not a case that raises them. Petitioners concede that with the dismissal of the TAC's "accounting misstatements . . . affirmed by the circuit court," they are "not pertinent to this petition." Pet. at 4. This is not a proper case in which to consider *Fait's* potential impact.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
DARREN J. ROBBINS
ERIC ALAN ISAACSON

(Counsel of Record)
erici@rgrdlaw.com
HENRY ROSEN
STEVEN F. HUBACHEK
AMANDA M. FRAME
ROBBINS GELLER RUDMAN
& Dowd LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

KEVIN L. MURPHY
GRAYDON HEAD & RITCHEY, LLP
2400 Chamber Center Drive,
Suite 300
Fort Mitchell, KY 41017
Telephone: 859/282-8800
859/525-0214 (fax)
Attorneys for Respondents

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REPLY BRIEF

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AND
BRIEFS

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No. 13-435

In the Supreme Court of the United States

OMNICARE, INC., *ET AL.*,
PETITIONERS

v.

THE LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND AND
THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

HARVEY KURZWEIL
RICHARD W. REINTHALER
JAMES P. SMITH III
JOHN E. SCHREIBER
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-8768
lcoberly@winston.com

STEFFEN N. JOHNSON
ELIZABETH P. PAPEZ
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Respondents do not dispute that the question presented is important and recurring, with broad implications for federal securities law and U.S. capital markets. Nor do they dispute that, if the circuits *are* divided, such a conflict warrants review. And they concede that circuit-level law on the issue is at least "confusing." Opp. 32. This all supports granting the petition, and it may explain why Respondents initially decided not to file an opposition.

The gist of Respondents' position is that they are so confident in their view of the merits that "the likelihood of serious conflict developing seems remote." *Id.* at 19; see *id.* at 20–26, 32–35 (discussing merits). ***But a serious conflict has already developed.*** The Sixth Circuit expressly "decline[d] to follow the Second and Ninth Circuits." Pet. App. 17a. Now, in the Sixth Circuit, a plaintiff may base a Section 11 claim on a statement of opinion without alleging "subjective falsity"—that is, without alleging that that the speaker did not, in fact, hold the opinion he was expressing. The law in the Second, Third, and Ninth Circuits is the opposite. These conflicting decisions reflect differing understandings of this Court's decision in *Virginia Bankshares*. Pet. 8-13; *infra* 4-9. Respondents explain at length that they agree with the Sixth Circuit's interpretation (Opp. 20–26), but every other circuit to consider this issue has interpreted *Virginia Bankshares* differently. In short, Respondents may prefer one side of the conflict, but they cannot reasonably deny that the conflict exists.

Respondents' efforts to dismiss these other authorities do not withstand scrutiny. Most remarka-

bly, Respondents insist that the Second Circuit's decision in *Fait* has not had "much impact" and "[r]elatively few decisions have even cited" it. Opp. 29. In fact, *Fait* has been cited *dozens* of times—so often that the Second Circuit describes *Fait*'s holding as "frequently" stated. See *infra* 4–5. Outside of court, Respondents' own counsel has touted the "express[]" split the decision below creates with the Second Circuit: "The court's opinion expressly rejects the Second Circuit's requirement, adopted in a 2011 decision, that statements of opinion cannot be deemed actionably misleading unless 'both objectively false and disbelieved by the defendant.'"[1] Although Respondents now prefer to characterize the Second Circuit's 2011 decision in *Fait* as "singularly garbled" (Opp. 19)—and the Ninth Circuit's as lacking a "rationale" (*id.* at 26, 27)—even a cursory review of those decisions shows otherwise.

This case is an ideal vehicle for resolving the conflict. Respondents cannot now claim that their allegations are sufficient "even under a subjective-disbelief standard" (Opp. 35), when the district court rejected that argument (Pet. App. 38a–40a), and that ruling was not disturbed on appeal. Moreover, the complaint affirmatively *disclaims* any allegation that Omnicare's officers subjectively disbelieved what they were saying. See Pet. App. 10a. The issue in this case could not be presented more cleanly.

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[1] Robbins Geller Rudman & Dowd LLP, *Sixth Circuit Holds That Statements of Opinion Need Not Be Knowingly False to Be Actionably Misleading* (available at http://www.rgrdlaw.com/ news-item-168.html (last visited January 27, 2014)).

Respondents' inflammatory account of the facts (Opp. 1–2, 5–11) does nothing to undermine the need for this Court's review. *Every* case under the federal securities laws involves allegations of misconduct. And Respondents' presentation of those allegations as fact is not only irrelevant but misleading. No court has ever found Omnicare guilty of doing what Respondents allege, nor has Omnicare ever admitted to such wrongdoing, either in a settlement or otherwise.

In short, the question in this case remains important, recurring, squarely presented, and the subject of an acknowledged intra-circuit conflict. The writ should be granted.

ARGUMENT

I. Respondents cannot hide from the acknowledged conflict below, and they offer no reason to believe it will resolve itself.

Respondents' central argument is that the petition "is grounded in a misreading of *Virginia Bankshares*." Opp. 20–26. This misses the point. What Respondents describe as a "misreading of *Virginia Bankshares*" is, in fact, binding precedent in at least three circuits. The petition thus presents far more than "the possibility of a nascent conflict." *Id.* at 19. As the Sixth Circuit announced, a conflict has already arisen. Pet. App. 17a.[2]

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[2] Respondents are also wrong to suggest that Petitioners never brought *Virginia Bankshares* to the Sixth Circuit's attention. Opp. 4, 18, 20. Petitioners presented a variety of authorities on subjective falsity—including *Fait*, which discussed *Virginia Bankshares* at length. The Sixth Cir-

This conflict is well established, and it is not going away. Despite Respondents' arguments to the contrary, the decisions that conflict with the Sixth Circuit's are neither "muddled" nor lacking in "rationale." Opp. 26, 27.

1. Take, for example, the Second Circuit's decision in *Fait*—which Respondents describe as "singularly garbled." Opp. 19. According to Respondents, *Fait* is so "conceptually incoherent" that it has not "had much impact" and "may be little more than a 'one-off' decision." *Id.* at 27–29. They contend that review would be "premature" because the "lower courts" may not follow *Fait* (*id.* at 19) and "[r]elatively few decisions have even cited it" (*id.* at 29).

Not so. At least *67* decisions have cited *Fait*, including 24 decisions citing it for the specific subjective falsity proposition at issue here.[3] Respondents protest that two of these decisions were summary orders (Opp. 29), but that merely confirms that *Fait* is so well settled that the Second Circuit routinely relies

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cuit took the point: "Defendants [Petitioners] argue that in *Fait* the Second Circuit correctly interpreted and applied the Supreme Court opinion [in] *Virginia Bankshares*." Pet. App. 16a. Accordingly, there was no waiver, and Respondents do not seriously argue otherwise.

[3] See, *e.g.*, *City of Westland Police & Fire Ret. Sys.* v. *MetLife, Inc.*, 928 F. Supp. 2d 705, 716 (S.D.N.Y. 2013) (Section 11); *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co. Inc.*, 888 F. Supp. 2d 431, 454 (S.D.N.Y. 2012) (same); *MHC Mut. Conversion Fund, L.P.* v. *United W. Bancorp, Inc.*, 913 F. Supp. 2d 1026, 1036 (D. Colo. 2012) (same).

on it without publication. In fact, in one of those orders, the Second Circuit notes that it cites the rule in *Fait* "frequently." *Freeman Grp.* v. *Royal Bank of Scotland Grp. PLC*, 2013 WL 5340476, at *2 (2d Cir. Sept. 25, 2013). A published decision that stands for a proposition cited "frequently" can be called only one thing: *settled law*.

It is no answer to say that "[o]ther Second Circuit decisions clearly hold that statements of opinion may be materially misleading * * * 'no matter how honestly but mistakenly held.'" Opp. 19. This argument refers to *Franklin Savings Bank of New York* v. *Levy*, 551 F.2d 521, 527 (2d Cir. 1977), which was decided 34 years before *Fait* and 14 years before *Virginia Bankshares*. It is superseded.[4]

Nor is *Fait* "muddled" merely because it holds that Section 11 claims, which do not require scienter, may nonetheless require subjective falsity. Opp. 27. As Respondent's counsel has observed elsewhere, "[n]othing in the law requires such mutual exclusivity among the pieces of evidence used to establish elements of a cause of action. For example, in the securities-fraud context, falsity and scienter are often inferred from the same facts." Eric A. Isaacson, *et al.*, *What's Brewing in* Dura v. Broudo: *A Review of the Supreme Court's Opinion & Its Import for Securities-Fraud Litigation*, 37 Loy. U. Chi. L.J. 1, 36 (2005). And the fact that the same facts *can* do double duty does not mean they are *always* doing double duty.

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[4] Respondents cite *Litwin* v. *Blackstone Group, L.P.*, 634 F.3d 706 (2d Cir. 2011), for a somewhat different proposition (Opp. 29); but it too was decided before *Fait*.

Fait explains that allegations about the speaker's subjective belief in an expressed opinion are necessary, not for scienter, but for material falsity. 655 F.3d at 112 n.5. The Second Circuit's reasoning flows from its understanding of *Virginia Bankshares*, which observes that a statement of opinion is actionable only as a representation about "the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. Pleading that such a statement is "false" necessarily requires allegations about falsity in the "psychological fact"—that is, allegations that the speaker did *not* believe what he was saying.

Respondents' critique of *Fait* is thus not really about whether it is clear enough to create a conflict. Instead, they simply think the Second Circuit was wrong. This underscores the need for this Court's review.

2. The conflict with the Ninth Circuit is similarly stark. Respondents contend that the Ninth Circuit's decision in *Rubke* offers "no reasoned analysis or rationale." Opp. 26. But *Rubke*'s rationale is evident from its reliance on both *Virginia Bankshares* and another decision from within the Ninth Circuit that carefully analyzes the requirement of falsity in this context. *Rubke*, 551 F.3d at 1162 (citing *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1265 (N.D. Cal. 2000)). The rule in *Rubke* is thus both clear and precedential.

Later district court decisions recognize this, treating *Rubke* as exactly what it is: the established law of the Ninth Circuit. As one court put it, "[u]nder recent Ninth Circuit law, statements of opinion are actionable under Section 11 'only if the complaint alleges with particularity that the statements were both

objectively and subjectively false or misleading.'" *In re Wash. Mut., Inc. Sec., Derivative & ERISA Litig.*, 259 F.R.D. 490, 506 (W.D. Wash. 2009) (quoting *Rubke*). District courts outside the Ninth Circuit agree. *E.g.*, *Belmont Holdings Corp.* v. *SunTrust Banks, Inc.*, 896 F. Supp. 2d 1210, 1229-1230 (N.D. Ga. 2012) (Section 11, citing *Rubke*). Courts bound by Ninth Circuit precedent are not free to disregard *Rubke* as stating its rule "rather casually," as Respondents do (Opp. 26)—as if a holding could be turned into dictum by the court's perceived tone of voice.

In an effort to blunt *Rubke*'s impact, Respondents cite other Ninth Circuit decisions under Section 11, but none involves a statement of opinion.[5] The point of *Rubke* (and *Fait*) is that statements of opinion require different allegations of falsity than pure statements of fact. Allegations about state of mind are required for opinion statements *because a statement of opinion is about the speaker's state of mind.* 551 F.3d at 1162 (case involved "misleading opinions, not statements of fact"). Thus, the Ninth Circuit's decision squarely conflicts with the decision in this case.

3. Although the Sixth Circuit did not say so, it also broke cleanly with the Third Circuit, which has "squarely held that opinions, predictions and other forward-looking statements * * * may be actionable

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[5] See *Hildes* v. *Arthur Andersen LLP*, 734 F.3d 854, 858 (9th Cir. 2013) ("[plaintiff] alleges that [defendant] overstated its revenue") and *Hemmer Grp.* v. *Sw. Water Co.*, 527 Fed. Appx. 623, 625-626 (9th Cir. 2013) ("The financial statements * * * were * * * incorrect."), both cited in Opp. 27 n.14.

misrepresentations if the speaker does not genuinely and reasonably believe them." *In re Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig.*, 7 F.3d 357, 368 (3d Cir. 1993) (Becker, J.).

Respondents do not suggest that this holding was dictum—nor could they. The *Trump Casino* court would never have had to decide whether the representation was "*material*" if the complaint had not also "allege[d] that the defendants made a misrepresentation with their statement that they *believed* they would be able to repay the principal and interest on the bonds." *Id.* at 369 (emphases in original).

Nor can Respondents avoid the conflict by observing that the Third Circuit referred to whether the speaker "genuinely *and reasonably*" believed the opinion expressed. Opp. 31 (emphasis in original). The Sixth Circuit's opinion conflicts with that conclusion, as it jettisons any requirement of genuine belief.

What is more, the Third Circuit aligned its requirement of "genuine[]" belief with *Virginia Bankshares*, which "held that a speaker's subjective disbelief or motivation, *standing alone*, would be inadequate to state a claim under § 14(a)." *Trump Casino*, 7 F.3d at 372 (emphasis added). In other words, subjective disbelief or motivation is necessary for liability, but it is not sufficient. Otherwise, a speaker could be held liable for the "impurities" of his proverbial "unclean heart." *Virginia Bankshares*, 501 U.S. at 1096. That would "threaten just the sort of strike suits and attrition by discovery that *Blue Chip Stamps* [v. *Manor Drug Stores*, 421 U.S. 723 (1975)] sought to discourage." 501 U.S. at 1096. Plainly, for statements of opinion to be actionable, *Trump Casino* requires subjective falsity.

In sum, there is no doubt about what *Trump Casino* means. That decision—like *Fait* and *Rubke*—holds that a Section 11 claim based on a statement of opinion requires subjective falsity. These published decisions constitute binding precedent in their respective circuits, and they squarely conflict with the decision below.[6]

II. This case is an excellent vehicle for resolving the conflict.

Respondents close their opposition by claiming that this case is a "poor test case" for resolving the question presented. Opp. 35. They argue that their allegations as to Omnicare and two of its former officers are sufficient to permit this case to "survive even under a subjective-disbelief standard." *Ibid.* But the district court specifically rejected this argument, and the court below did not disturb that ruling. This is not surprising, as Respondents' complaint "expressly exclude[d] and disclaim[ed] any [such] allegations." Pet. App. 10a.

In the district court, Respondents pointed to the same statements of opinion (about Omnicare's legal

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[6] It is irrelevant that some state authorities hold that a statement of opinion may be actionable without any allegation of subjective falsity. See Opp. 23–25 (citing cases). In some state jurisdictions, of course, a statement of opinion is not actionable at all. See, *e.g.*, *Barbara's Sales, Inc.* v. *Intel Corp.*, 227 Ill. 2d 45, 73 (2007); *Sandy Creek Condo. Ass'n* v. *Stolt & Egner, Inc.*, 267 Ill. App. 3d 291, 298 (2d Dist. 1994). If state courts disagree about that issue, that is a function of the diverse common law and is irrelevant to the conflict here under federal law.

compliance) and argued that the complaint's allegations were sufficient to show that officers Froesel and Gemunder knew at the time that those statements were false. But as the district court found, the facts alleged in the complaint established only that Froesel and Gemunder operated the relevant part of the business "with the goal of improving the company's profitability." Pet. App. 38a–39a. As the district court explained, "[p]resumably all publicly[]traded companies conduct their activities in order to be profitable. That is a far cry, however, from inferring that the company's officers knew they were violating the law." *Id.* at 39a.

The district court also rejected Respondents' claim that Froesel directed regional employees to take steps "to switch patients' prescriptions from lower-priced to higher-priced drugs." Opp. 36. On that point too, the court found the complaint's allegations insufficient. Pet. App. 39a. And the court held that "[t]he allegations against Gemunder are similarly lacking." *Ibid.* For example, the paragraphs of the complaint discussing "a therapeutic initiative to steer patients towards Risperdal" (Opp. 36) "make no mention of Gemunder" (Pet. App. 40a).

The Sixth Circuit plainly agreed. If the complaint had alleged subjective falsity—a point Respondents argued in their opening brief below (No. 12-5287, Appellant's Br. 57–59)—the Sixth Circuit would never have had to decide whether a claim could be stated *without* subjective falsity. Again, Respondents' complaint affirmatively disclaims any allegation of knowing falsity: "Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless

misconduct, as this claim is based solely on the theories of strict liability and negligence under the Securities Act." Pet. App. 10a. Although the courts below held this statement inadequate to circumvent the heightened pleading standards of Rule 9, the contract's disclaimer means that the question here could not be presented more cleanly.

Finally, the fact that this case involves statements of opinion about legal compliance—rather than "misstated financial results" or an auditor's report (Opp. 36–37)—actually strengthens the case for review. The decision below presents the legal issue in the most straightforward way possible. The supposed misstatements here are undeniably statements of opinion. Indeed, some actually begin with the words "'[w]e believe.'" See *id.* at 7 (quoting Registration Statement). Yet even in this clear case, the circuits still disagree about the governing legal standard.

To the extent the Court wishes to examine the implications of its ruling in other contexts—which Respondents concede could raise "important questions" in the future (Opp. 37)—those implications will doubtless be addressed by both the parties and *amici* in their merits briefs. That is true in nearly every case before this Court. The question for today is whether the particular facts alleged here will allow the Court to answer the question presented and resolve the conflict among the circuits. The answer is yes. In fact, deciding the question in this clear-cut factual context will permit the Court to focus on the unsettled legal issue itself, without needing to address the finer questions about whether a particular kind of statement should be treated as a statement of opinion for these purposes. In short, the uncluttered

facts here are a reason to *grant* the petition, not to deny it.

CONCLUSION

Three circuits hold that statements of opinion in registration statements should not be judged solely in the sharp gaze of hindsight. In those circuits, a plaintiff seeking to base a Section 11 claim on a statement of opinion must allege that the speaker did not honestly hold the opinion expressed. The Sixth Circuit disagreed, based on a fundamentally different reading of this Court's decision in *Virginia Bankshares*. A conflict has arisen among the circuits, and this case presents a strong and timely vehicle for resolving it. The Court should grant review.

Respectfully submitted.

HARVEY KURZWEIL
RICHARD W. REINTHALER
JAMES P. SMITH III
JOHN E. SCHREIBER
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-8768
lcoberly@winston.com

STEFFEN N. JOHNSON
ELIZABETH P. PAPEZ
ANDREW C. NICHOLS
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000

JANUARY 2014

JOINT APPENDIX

No. 13-435

In the Supreme Court of the United States

OMNICARE, INC., *et al.*,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

KANNON K. SHANMUGAM
Counsel of Record
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com
Counsel for Petitioners

ERIC ALAN ISAACSON
Counsel of Record
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway
Suite 1900
San Diego, CA 92101
(619) 231-1058
EricI@rgrdlaw.com
Counsel for Respondents

PETITION FOR CERTIORARI FILED OCTOBER 4, 2013
CERTIORARI GRANTED MARCH 3, 2014

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Relevant Docket Entries,
U.S. District Court, E.D. Ky.
Docket No. 2:06-cv-00026-WOB

DATE	NO.	PROCEEDINGS
2/2/2006	1	COMPLAINT 3 summons(es) issued with copy (Filing fee $250; receipt number 122609), filed by Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund. (Attachments: # 1 Certification of Plaintiff # 2 Civil Cover Sheet, Case Assignment, Receipt # 3 Summons) (JMM) (Entered: 02/03/2006)
		* * *
5/22/2006	22	ORDER granting 16 Motion to Consolidate Related Case - Cov Civil Action No. 06-31 pursuant to Fed. R. Civ. P. 42(a) and appointing The Laborers District Council Construction Industry Pension Fund as Lead Plaintiff. Signed by Judge William O. Bertelsman. (JMM)cc: COR (Entered: 05/22/2006)
		* * *
7/20/2006	27	AMENDED COMPLAINT CONSOLIDATED AMENDED COMPLAINT FOR VIOLATION OF THE FEDERAL SECURITIES LAWS against all defendants, filed by Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund.(Murphy, Kevin) (Entered: 07/20/2006)

DATE	NO.	PROCEEDINGS
		* * *
10/31/2006	35	MOTION for Leave to File by Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund MOTION FOR LEAVE TO FILE A FIRST AMENDED CONSOLIDATED COMPLAINT (Attachments: # 1 Memorandum in Support MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR LEAVE TO FILE A FIRST AMENDED CONSOLIDATED COMPLAINT# 2 Proposed Order [PROPOSED] ORDER GRANTING LEAD PLAINTIFF'S MOTION FOR LEAVE TO FILE A FIRST AMENDED CONSOLIDATED COMPLAINT# 3 Exhibit FIRST AMENDED CONSOLIDATED COMPLAINT FOR VIOLATION OF FEDERAL SECURITIES LAWS# 4 Exhibit CERTIFICATION OF CEMENT MASIONS LOCAL 526 COMBINED FUNDS)(Rosen, Henry) (Entered: 10/31/2006)
		* * *
11/20/2006	42	RESPONSE in Opposition re 35 MOTION for Leave to File by Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund filed by Omnicare, Inc., Joel F. Gemunder, David W. Froesel, Jr. (Attachments: # 1 Affidavit

DATE	NO.	PROCEEDINGS
		Declaration of John Schreiber# 2 Exhibit Schreiber Declaration Ex 1 Part A# 3 Exhibit Schreiber Declaration Ex 1 Part B# 4 Exhibit Schreiber Declaration Ex 1 Part C# 5 Exhibit Schreiber Declaration Ex 2# 6 Exhibit Schreiber Declaration Ex 3# 7 Exhibit Schreiber Declaration Ex 4 Part A# 8 Exhibit Schreiber Declaration Ex 4 Part B# 9 Exhibit Schreiber Declaration Ex 4 Part C# 10 Exhibit Schreiber Declaration Ex 4 Part D# 11 Exhibit Schreiber Declaration Ex 4 Part E# 12 Exhibit Schreiber Declaration Ex 4 Part F# 13 Exhibit Schreiber Declaration Ex 4 Part G# 14 Exhibit Schreiber Declaration Ex 5# 15 Exhibit Schreiber Declaratin Ex 6 Part A# 16 Exhibit Schreiber Declaration Ex 6 Part B# 17 Exhibit Schreiber Declaration Ex 6 Part C# 18 Exhibit Schreiber Declaration Ex 6 Part D# 19 Exhibit Schreiber Declaration Ex 6 Part E# 20 Exhibit Schreiber Declaration Ex 6 Part F# 21 Exhibit Schreiber Declaration Ex 6 Part G# 22 Exhibit Schreiber Declaration Ex 6 Part H# 23 Exhibit Schreiber Declaration Ex 6 Part I# 24 Exhibit Schreiber Declaration Ex 6 Part J# 25 Exhibit Schreiber Declaration Ex 7# 26 Exhibit Schreiber Declaration Ex 8# 27 Proposed Order Proposed Order) (Robinson, William) (Entered: 11/20/2006)

DATE	NO.	PROCEEDINGS
12/1/2006	43	REPLY BRIEF to 35 Defs' Mem in Opp to Lead Pltf's Mot to File First Amend Consol Cpt filed by Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund. (Attachments: # 1 Exhibit A# 2 Exhibit B)(Rosen, Henry) Modified on 12/4/2006 (to describe Exhibits)(Maxie, Joyce). (Entered: 12/01/2006)
		* * *
1/26/2007	51	ORDER FOR TELEPHONE CONFERENCE held on 1/26/07 before Judge William O. Bertelsman: 1) Granting 35 MOTION for Leave to File amended consolidated complaint; 2) Defendants shall file their Motion to Dismiss the CAC on or before 3/12/2007; Plaintiffs shall file their Response thereto within thirty (30) days; and defendants shall file any Replies thereto within fifteen (15) days. (COURT REPORTER: JOAN AVERDICK) (JMM)cc: COR (Entered: 01/26/2007)
1/26/2007	52	FIRST AMENDED COMPLAINT against Cheryl D. Hodges, Edward L. Hutton and Sandra E. Laney, filed by Cement Mason Local 526 Combined Funds. (Attachments: # 1 Certificate of Cement Mason Local 526 Combined Funds)(JMM) (Entered: 01/29/2007)
		* * *

DATE	NO.	PROCEEDINGS
3/13/2007	59	MOTION to Dismiss by Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc., Joel F. Gemunder, David W. Froesel, Jr CORRECTED (Attachments: # 1 Memorandum in Support# 2 Proposed Order# 3 Declaration of Wm T. Robinson# 4 Dec Exh A# 5 Dec Exh B# 6 Dec Exh C# 7 Dec Exh D# 8 Dec Exh E# 9 Dec Exh F# 10 Dec Exh G# 11 Dec Exh H# 12 Dec Exh I# 13 Dec Exh J# 14 Dec Exh K# 15 Dec Exh L# 16 Dec Exh M# 17 Dec Exh N# 18 Dec Exh O# 19 Dec Exh P# 20 Dec Exh Q# 21 Dec Exh R# 22 Dec Exh S# 23 Dec Exh T# 24 Dec Exh U# 25 Dec Exh V# 26 Dec Exh W# 27 Dec Exh X)(Robinson, William) (Entered: 03/13/2007)
		* * *
4/4/2007	61	TRANSCRIPT of Official Proceedings: Telephone Conference held on 1/26/2007 before Judge William O. Bertelsman. Court Reporter: Joan Averdick. (JMM) (Entered: 04/05/2007)
		* * *
4/12/2007	63	RESPONSE in Opposition re 59 MOTION to Dismiss by Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc., Joel F. Gemunder, David W. Froesel, Jr CORRECTED PLTFFS' MEM OF LAW IN OPPOSITION TO DEFENDANTS? MOTION TO DISMISS filed by

DATE	NO.	PROCEEDINGS
		Cement Mason Local 526 Combined Funds, Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund. (Attachments: # 1 Affidavit Declaration of Henry Rosen# 2 Exhibit A - US DOJ Press Release# 3 Exhibit B - TheStreet.com Article# 4 Exhibit C - Omnicare 11/7/05 Statement# 5 Exhibit D - Mich. AG Press Release# 6 Exhibit E - Omnicare 11/14/06 Press Release# 7 Exhibit F - Omnicare 10/31/06 Press Release# 8 Exhibit G - Slip Op.# 9 Proposed Order Proposed Order)(Rosen, Henry) (Entered: 04/12/2007)
		* * *
5/1/2007	68	REPLY BRIEF to 62 in Further Support of Defendant's Motion to Dismiss filed by Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc., Joel F. Gemunder, David W. Froesel, Jr. (Attachments: # 1 Supplemental Declaration of Wm Robinson# 2 Declaration Exhibit A# 3 Declaration Exhibit B# 4 Declaration Exhibit C)(Robinson, William) (Entered: 05/01/2007)
		* * *
8/13/2007	85	TRANSCRIPT of Official Proceedings: Oral Argument held on August 2, 2007 before Judge William O. Bertelsman. Court Reporter: Lisa Wiesman. (JMM) (Entered: 08/13/2007)

DATE	NO.	PROCEEDINGS

* * *

10/12/2007	93	MEMORANDUM OPINION & ORDER: 1) Defendants' Motion to dismiss 59 be, and is hereby, GRANTED; 2) Plaintiffs' motion to add an additional named plaintiff 76 be, and is hereby, DENIED; and defendants' motion for leave to file a surreply 89 be, and is hereby, DENIED AS MOOT. A seaprate judgment shall enter concurrently herewith. Signed by Judge William O. Bertelsman. (JMM)cc: COR (Entered: 10/12/2007)
10/12/2007	94	JUDGMENT: Pursuant to the Memorandum Opinion and Order entered concurrently herewith, It is Ordered and Adjudged that judgment be, and is hereby, ENTERED in favor of defendants, and the complaint is hereby dismissed. Signed by Judge William O. Bertelsman. (JMM)cc: COR (Entered: 10/12/2007)
11/9/2007	95	NOTICE OF APPEAL as to 93 Memorandum Opinion & Order, Terminate Motions,, by Cement Mason Local 526 Combined Funds, Laborers District Council Construction Industry Pension Fund. Filing fee $ 455, receipt number 1066438. (Rosen, Henry) (Entered: 11/09/2007)
10/21/2009	96	USCA JUDGMENT as to 95 Notice of Appeal filed by Laborers District Council Construction Industry Pension

DATE	NO.	PROCEEDINGS
		Fund, Cement Mason Local 526 Combined Funds. Judgment of the District Court is AFFIRMED IN PART, REVERSED IN PART, and the case is REMANDED for further proceedings consistent with the opinion of this court. District Court's dismissal of the §10(b), §20(a) and Rule 10b-5 claims as well as the denial of Alaska Electrical's motion to intervene are AFFIRMED. REVERSED on the dismissal of the §11 claim and REMAND the case to the District Court for further proceedings. (Attachments: # 1 Opinion, # 2 Cover letter)(TED) (Entered: 10/22/2009)
1/13/2010	97	MANDATE of USCA as to 95 Notice of Appeal filed by Laborers District Council Construction Industry Pension Fund, Cement Mason Local 526 Combined Funds (LST) (Entered: 01/13/2010)
		* * *
5/21/2010	105	Letter from US Supreme Court; 1)Petition for Writ of certiorari was filed on 5/14/2010 and placed on the docket May 18, 2010 as No. 09-1400 re 95 Notice of Appeal (LST) (Entered: 05/21/2010)
		* * *
11/8/2010	112	CERTIFIED COPIES OF STIPULATION TO DISMISS THE PETITION FOR WRIT OF

DATE	NO.	PROCEEDINGS
		CERTIORARI and ORDER OF DISMISSAL pursuant to Rule 46.1 of the Rules of the Supreme Court of the United States (LST) (Entered: 11/08/2010)
		* * *
12/30/2010	118	MOTION for Leave by Cement Mason Local 526 Combined Funds, Laborers District Council Construction Industry Pension Fund to File the [Proposed] Second Amended Consolidated Complaint for Violations of Section 11 of the Securities Act of 1933 (Attachments: # 1 Memorandum in Support, # 2 Exhibit [Proposed] Second Amended Consolidated Complaint for Violations of Section 11 of the Securities Act of 1933, # 3 Exhibit Complaint, Kammerer v. Omnicare, Inc., # 4 Exhibit Complaint, Maguire v. Omnicare, Inc., # 5 Exhibit Complaint, Lisitza v. Omnicare, Inc., # 6 Exhibit Attorney General Tony Wests Remarks, # 7 Exhibit November 3, 2009 DOJ Press Release, # 8 Exhibit Complaint, United States v. Johnson & Johnson, # 9 Exhibit September 25, 2001 Omnicare - Current Analysis & Recommendations, # 10 Exhibit April 1997 Supply Agreement, # 11 Exhibit June 12, 1997 Memorandum, # 12 Exhibit April 1999 Supply

DATE	NO.	PROCEEDINGS
		Agreement, # 13 Exhibit July 19, 1999 Omnicare Memorandum, # 14 Exhibit Complaint, United States v. Omnicare, Inc., # 15 Exhibit Part One - Complaint, United States v. Omnicare, Inc., # 16 Exhibit Part two - Complaint, United States v. Omnicare, Inc., # 17 Exhibit August 12, 2003 E-mails, # 18 Exhibit November 11 & 25, 2003 E-mails, # 19 Exhibit Letter from Charles G. Atkins of Strauss & Troy, # 20 Exhibit March 10, 2003 Omnicare Memorandum, # 21 Exhibit June 1, 2000 Omnicare Physician Authorization Letter Template, # 22 Exhibit Settlement Agreement between the State of Michigan and Omnicare, Inc. (2006), # 23 Exhibit Settlement Agreement between DOJ and Omnicare, Inc. (2006), # 24 Exhibit E-mails from Bruce Cummins re Omnicare Rebate Dilemma, # 25 Exhibit February 1, 1999 Amendment to Supply Agreement, # 26 Exhibit August 25, 1998 Memorandum, # 27 Exhibit Consulting and Services Agreement Payment Schedule, 3Q00-1Q04, # 28 Exhibit Consulting Services Agreement, # 29 Exhibit Omnicare Profile for 2Q 2000, # 30 Exhibit October 1, 2000 Amendment to Supply Agreement, # 31 Exhibit July 8, 19 & 22, 2002 E-mails, # 32 Exhibit June 15, 1999 Letter, # 33 Exhibit

DATE	NO.	PROCEEDINGS
		January 2002 Long-Term Care Group Monthly Report, # 34 Exhibit April 16, 2003 Letter, # 35 Exhibit November 23, 2001 Memorandum, # 36 Exhibit July 2001 Long-Term Care Group Monthly Report, # 37 Exhibit June 19, 21 & 28, 2002 E-mails, # 38 Exhibit 1998/1999 Rebate Omnicare, # 39 Exhibit PowerPoint Presentation re Omnicare 2000 Business Plan, # 40 Exhibit Omnicare Company Profile, # 41 Exhibit June 19 & 21, 2002 E-mails, # 42 Exhibit December 15, 1999, Long-Term Care Group Update, # 43 Exhibit February 7 & 9, 2003 E-mails, # 44 Exhibit Complaint, United States v. Omnicare, Inc. and Ivax Pharms., Inc., # 45 Exhibit Financial Results Summary Schedule, # 46 Proposed Order)(Rosen, Henry) (Entered: 12/30/2010)
		* * *
2/4/2011	120	NOTICE OF FILING by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc. Notice of Filing Renewed Motion to Dismiss Plaintiffs' Claim for Violation of Section 11 of the Securities Act of 1933 and Opposition to Plaintiffs' Motion for Leave to File a Third Amended Complaint (Robinson, William) (Entered: 02/04/2011)

DATE	NO.	PROCEEDINGS
2/4/2011	121	RESPONSE in Opposition re 118 MOTION for Leave by Cement Mason Local 526 Combined Funds, Laborers District Council Construction Industry Pension Fund to File the [Proposed] Second Amended Consolidated Complaint for Violations of Section 11 of the Securities Act of 1933 and Memorandum of Points and Authorities in Support of Defendants' Renewed Motion to Dismiss Plaintiffs' Claim for Violation of Section 11 of the Securities Act of 1933 filed by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc.. (Attachments: # 1 Declaration of Wm. T. Robinson III, # 2 Exhibit A – Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc., 583 F. 3d 935 (6th Cir. 2009), # 3 Exhibit B – Plaintiffs Second Amended Complaint, # 4 Exhibit C – January 26, 2007 Order granting plaintiffs Motion to File a Second Amended Complaint, # 5 Exhibit D – Schedule A to Certificate of Laborers District Council, filed on or about April 3, 2006, # 6 Exhibit E – Schedule A to the Certificate of Cement Masons, filed on or about January 26, 2007, # 7 Exhibit F – Plaintiffs Reply in Support of Motion to file Second Amended

DATE	NO.	PROCEEDINGS
		Complaint, # 8 Exhibit G – Omnicares Form 8-K filed on January 13, 2006, # 9 Exhibit H – Cincinnati Enquirer article published on January 13, 2006 entitled Omnicare Site Searched, # 10 Exhibit I – Cincinnati Enquirer article published on January 27, 2006 entitled Omnicare Offices in Michigan Raided, # 11 Exhibit J – Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc., 527 F. Supp. 2d 698 (E.D. Ky. 2007), # 12 Exhibit K – 2005 Form 10-K filed on March 16, 2006, # 13 Exhibit L – 2009 Form 10-K filed on February 25, 2010, # 14 Exhibit M – 3Q 2005 10-Q/A filed on November 23, 2005, # 15 Exhibit N – 2Q 2005 10-Q filed on August 9, 2005, # 16 Exhibit O – 1Q 2006 10-Q filed on May 10, 2006, # 17 Exhibit P – press release dated November 3, 2009 and entitled Omnicare Completes Voluntary Settlement, # 18 Proposed Order)(Robinson, William) Modified to clean up docket text on 2/7/2011 (LST). (Entered: 02/04/2011)
2/4/2011	125	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S RENEWED MOTION to Dismiss Plaintiff's Claim for Violations of 11 of The Securities Act of 1933 by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges,

DATE	NO.	PROCEEDINGS
		Edward L. Hutton, Sandra E. Laney, Omnicare, Inc. filed Pursuant to QC re 121 (Attachments: # 1 Declaration of Wm. T. Robinson III, # 2 Exhibit A - Indiana State Dist. Counsel of Laborers & Hod Carriers Pension, # 3 Exhibit B - Plaintiffs Second Amended Complaint, # 4 Exhibit C - January 26, 2007 Order granting Plaintiffs Motion to file, # 5 Exhibit D - Schedule A to Certificate of Laborers District Counsel, # 6 Exhibit E - Schedule A to the Certificate of Cement Masons, # 7 Exhibit F - Plaintiffs Reply in Support of Motion to file, # 8 Exhibit G - Omnicares Form 8-K filed on 1/13/2006, # 9 Exhibit H - Cincinnati Enquirer article published on 1/13/2006, # 10 Exhibit I - Cincinnati Enquirer article published on 1/27/2006, # 11 Exhibit J - Indiana State Dist. Council of Laboers 7 Hod Carriers Pension, # 12 Exhibit K - 2005 Form 10-K filed on 3/16/2006, # 13 Exhibit L - 2009 Form 10-K filed on 2/25/2010, # 14 Exhibit M - 3Q 2005 10-Q/A filed on 11/23/2005, # 15 Exhibit N - 2Q 2005 10-Q filed on 8/9/2005, # 16 Exhibit O - 1Q 2006 10-Q filed on 5/10/2006, # 17 Exhibit P - press release dated 11/3/2009, # 18 Proposed Order)(LST) (Entered: 03/08/2011)

* * *

DATE	NO.	PROCEEDINGS
3/4/2011	123	REPLY to Response to Motion re 118 MOTION for Leave by Cement Mason Local 526 Combined Funds, Laborers District Council Construction Industry Pension Fund to File the [Proposed] Second Amended Consolidated Complaint for Violations of Section 11 of the Securities Act of 1933 filed by Cement Mason Local 526 Combined Funds, Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund. (Attachments: # 1 Exhibit A - Corporate Integrity Agreement, # 2 Exhibit B (part 1 of 2) - 2010 Form 10-K, # 3 Exhibit B (part 2 of 2) - 2010 Form 10-K)(Rosen, Henry) Modified to clean up docket text on 3/9/2011 (LST). (Entered: 03/04/2011)
		* * *
3/18/2011	127	RESPONSE to Motion re 125 MOTION to Dismiss by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc. filed by Cement Mason Local 526 Combined Funds, Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund. (Rosen, Henry) (Entered: 03/18/2011)
		* * *

DATE	NO.	PROCEEDINGS
3/25/2011	129	REPLY to Response to Motion re 125 MOTION to Dismiss by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc. filed by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc.. (Robinson, William) (Entered: 03/25/2011)
		* * *
7/14/2011	133	MEMORANDUM OPINION AND ORDER; 1)Def's 125 Renewed Motion to Dismiss is GRANTED; 2)Pla's 118 Motion to file a second amended complaint is GRANTED; 3)Tendered Second Amended complaint is DEEMED FILED CONCURRENTLY. Signed by Judge William O. Bertelsman on 07/14/2011. (LST)cc: COR (Entered: 07/14/2011)
7/14/2011	134	SECOND AMENDED COMPLAINT CONSOLIDATED COMPLAINT FOR VIOLATIONS OF THE SECURITIES ACT OF 1933 against David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, filed by Cement Mason Local 526 Combined Funds, Donna Chi, Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund. Filed Pursuant to 133 Order (Attachments:

DATE	NO.	PROCEEDINGS
		# 1 Exhibit 1 - Kammerer v. Omnicare, Inc. Complaint, # 2 Exhibit 2 - Maguire v. Omnicare, Inc. Complaint, # 3 Exhibit 3 - Lisitza v. Omnicare, Inc., # 4 Exhibit 4 - General Tony Wests Remarks, # 5 Exhibit 5 - November 3, 2009 DOJ Press Release, # 6 Exhibit 6 - United States v. Johnson and Johnson, # 7 Exhibit 7 - Omnicare - Current Analysis and Recommendations, # 8 Exhibit 8 - April 1997 Supply Agreement, # 9 Exhibit 9 - July 19, 1999 Omnicare Memorandum, # 10 Exhibit 10 - April 1999 Supply Agreement, # 11 Exhibit 11 - July 19, 1999 Omnicare Memorandum, # 12 Exhibit 12 - United States v. Omnicare, Inc., # 13 Exhibit 13 - Part One - United States v. Omnicare, Inc. Complaint, # 14 Exhibit 13 - Part Two - United States v. Omnicare, Inc. Complaint, # 15 Exhibit 14 - August 12, 2003 E-mails, # 16 Exhibit 15 - November 11 and 25, 2003 E-mails, # 17 Exhibit 16 - Letter from Charles G. Atkins of Strauss & Troy, # 18 Exhibit 17 - March 10, 2003 Omnicare Memorandum, # 19 Exhibit 18 - June 1, 2000 Omnicare Physician Authorization letter Template, # 20 Exhibit 19 - Settlement Agreement between the State of Michigan and Omnicare, Inc., # 21 Exhibit 20 -

DATE	NO.	PROCEEDINGS
		Settlement Agreement between DOJ and Omnicare, Inc., # 22 Exhibit 21 - E-mails from Bruce Bruce Cummins re Omnicare Rebate Dilemma, # 23 Exhibit 22 - February 1, 1999 Amendment to Supply Agreement, # 24 Exhibit 23 - August 25, 1998 Memorandum, # 25 Exhibit 24 - Consulting and Services Agreement Payment Schedule, 3Q00-1Q04, # 26 Exhibit 25 - Consulting Services Agreement, # 27 Exhibit 26 - Omnicare Profile for 2Q 2000, # 28 Exhibit 27 - October 1, 2000 Amendment to Supply Agreement, # 29 Exhibit 28 - July 8, 19 and 22, 2002 E-mails, # 30 Exhibit 29 - June 15, 1999 Letter, # 31 Exhibit 30 - January 2002 Long-Term Care Group Monthly Report, # 32 Exhibit 31 - April 16, 2003 Letter, # 33 Exhibit 32 - November 23, 2001 Memorandum, # 34 Exhibit 33 - July 2001 Long-Term Care Group Monthly Report, # 35 Exhibit 34 - June 19, 21 and 28, 2002 E-Mails, # 36 Exhibit 35 - Exhibit 1998/1999 Rebate Omnicare, # 37 Exhibit 36 - Power Point Presentation re Omnicare 2000 Business Plan, # 38 Exhibit 37 - Omnicare Company Profile, # 39 Exhibit 38 - June 19 and 21, 2002 E-mails, # 40 Exhibit 39 - December 15, 1999, Long-Germ Care Group Update, # 41 Exhibit 40 -

DATE	NO.	PROCEEDINGS
		February 7 & 9, 2003 E-mails, # 42 Exhibit 41 - U.S. v. Omnicare, Inc. and Ivax Pharms, Inc. Complaint, # 43 Exhibit 42 - Financial Results Summary Schedule)(LST) (Entered: 07/14/2011)
7/15/2011	135	TRANSCRIPT of Proceedings: ORAL ARGUMENT held on 7/13/11 before Judge William O. Bertelsman. Court Reporter: Joan Averdick, Telephone number (859) 291-9666. Transcript ordered by: Defendants. IMPORTANT NOTICE - REDACTION OF TRANSCRIPTS: In order to remove personal identifier data from the transcript, a party must follow the Court's policy regarding the Redaction Responsibility of Counsel and Parties. The policy governing the redaction of personal information is located on the court website at www.kyed. uscourts.gov. Read this policy carefully. Sample forms, i.e., a Notice of Intent to Redact, may be found on the court website by clicking on Local Forms. If there are no redactions requested, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available via PACER 90 days from today's date. The Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the

DATE	NO.	PROCEEDINGS
		deadline for Release of Transcript Restriction. Redaction Request due 8/8/2011. Redacted Transcript Deadline set for 8/18/2011. Release of Transcript Restriction set for 10/17/2011. (Entered: 07/15/2011)
		* * *
8/19/2011	138	MOTION to Dismiss by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc. (Attachments: # 1 Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiffs' Third Amended Consolidated Complaint, # 2 Declaration of Wm. T. Robinson III, # 3 Ex A - Third Amended Consolidated Complaint (Doc #: 134), # 4 Ex B - December 2005 Registration Statement, # 5 Ex C - July 14, 2011 Order granting plaintiffs Motion to File a Second Amended Complaint and defendants Renewed Motion to Dismiss (Doc #: 133), # 6 Ex D - Press release dated November 3, 2009 and entitled Omnicare Completes Voluntary Settlement, # 7 Ex E - Schedule A to the Certificate of Laborers District Council, filed on or about April 3, 2006, # 8 Ex F - Schedule A to the Certificate of Cement Masons, filed on or about January 26, 2007, # 9 Ex G -

DATE	NO.	PROCEEDINGS
		Plaintiffs Reply in Support of Motion for Leave to File First Amended Consolidated Complaint (Doc #: 43), # 10 Ex H - Omnicares stock closing prices from January 1, 2006 December 31, 2009, available from Nasdaq.com, # 11 Ex I - October 12, 2007 Order granting defendants Motion to Dismiss (Doc #: 93), # 12 Ex J - Sixth Circuits opinion in this case, Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc., 583 F. 3d 935 (6th Cir. 2009) (Doc: #96), # 13 Ex K - 2005 Form 10-K, # 14 Ex L - 2006 Form 10-K, # 15 Ex M - 2007 Form 10-K, # 16 Ex N - 2008 Form 10-K, # 17 Ex O - 2009/2010 Form 10-K, # 18 Ex P - 2010 Form 10-K, # 19 Ex Q - Omnicares Form 8-K filed on January 13, 2006, # 20 Ex R - Reuters News article published on January 13, 2006 entitled Omnicare Says Gets Subpoena From U.S. Attorney, # 21 Ex S - Business First article published on January 16, 2006 entitled Omnicare Subpoenaed in Generic Drug Probe, # 22 Ex T - TheStreet.com article published on January 17, 2006 entitled Probe News Punishes Omnicare Shares, # 23 Ex U - Cincinnati Enquirer article published on January 19, 2006 entitled Omnicare, Inc. Site Searched,

DATE	NO.	PROCEEDINGS
		# 24 Ex V - Cincinnati Enquirer article published on January 27, 2006 entitled Omnicare Offices in Mich. Raided, # 25 Proposed Order)(Robinson, William) (Entered: 08/19/2011)
9/23/2011	139	RESPONSE in Opposition re 138 MOTION to Dismiss by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc. filed by Cement Mason Local 526 Combined Funds, Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund, Laborers District Council Construction Industry Pension Fund. (Attachments: # 1 Exhibit A, Form 10-K for fiscal year ended Dec. 31, 2004, # 2 Exhibit B, Omnicare, Inc. Code of Business Conduct and Ethics, # 3 Proposed Order Denying Defendants' Motion to Dismiss)(Rosen, Henry) (Entered: 09/23/2011)
		* * *
10/21/2011	142	REPLY to 138 MOTION to Dismiss filed by David W. Froesel, Jr, Joel F. Gemunder, Cheryl D. Hodges, Edward L. Hutton, Sandra E. Laney, Omnicare, Inc.. (Attachments: # 1 Exhibit Nitardy Reply Declaration, # 2 Exhibit Exhibit to Nitardy Reply Declaration)(Robinson, William)

DATE	NO.	PROCEEDINGS
		Modified to better describe on 10/24/2011 (LST). (Entered: 10/21/2011)
		* * *
2/9/2012	147	TRANSCRIPT of Proceedings: ORAL ARGUMENT held on 1/26/12 before Judge William O. Bertelsman. Court Reporter: Joan Averdick, Telephone number (859) 291-9666. Transcript ordered by: Kevin Murphy, Esq.. IMPORTANT NOTICE – REDACTION OF TRANSCRIPTS: In order to remove personal identifier data from the transcript, a party must follow the Court's policy regarding the Redaction Responsibility of Counsel and Parties. The policy governing the redaction of personal information is located on the court website at www.kyed.uscourts.gov. Read this policy carefully. Sample forms, i.e., a Notice of Intent to Redact, may be found on the court website by clicking on Local Forms. If there are no redactions requested, the court will assume redaction of personal identifiers is not necessary and the transcript will be made available via PACER 90 days from today's date. The Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript

DATE	NO.	PROCEEDINGS
		Restriction. Redaction Request due 3/5/2012. Redacted Transcript Deadline set for 3/15/2012. Release of Transcript Restriction set for 5/14/2012. (Entered: 02/09/2012)
2/13/2012	148	MEMORANDUM, OPINION AND ORDER; 1)Def's 138 Motion to Dismiss Pla's Third amended complaint is GRANTED; 2)A separate Judgment to enter concurrently. Signed by Judge William O. Bertelsman on 2/13/2012. (LST)cc: COR (Entered: 02/13/2012)
2/13/2012	149	JUDGMENT; 1)Entered in favor of defendants; 2)Complaint is dismissed; 3)Matter is stricken from the docket of this Court. Signed by Judge William O. Bertelsman on 2/13/2012.(LST)cc: COR (Entered: 02/13/2012)
3/12/2012	150	NOTICE OF APPEAL as to 149 Judgment by Cement Mason Local 526 Combined Funds, Laborers District Council Construction Industry Pension Fund. Filing fee $455, receipt number 0643-2291611. (Rosen, Henry) (Entered: 03/12/2012)
		* * *
5/23/2013	153	OPINION of USCA as to 150 Notice of Appeal filed by Laborers District Council Construction Industry Pension Fund, Cement Mason Local

DATE	NO.	PROCEEDINGS
		526 Combined Funds; 1)District Court's decision regarding Defs' legal compliance claims are REVERSED and REMANDED for further proceedings consistent w/this opinion; 2)District Court's decision w/respect to Plas' GAAP-based claims are AFFIRMED (Attachments: # 1 Cover Letter - Mandate to Issue)(LST) (Entered: 05/23/2013)
5/23/2013	154	USCA JUDGMENT as to 150 Notice of Appeal filed by Laborers District Council Construction Industry Pension Fund, Cement Mason Local 526 Combined Funds; 1)District court's judgment w/regard to Defs' legal compliance is REVERSED and REMANDED for further proceedings consistent w/the opinion of this court; 2)Judgment w/respect to Plas' GAAP-based claims is AFFIRMED (LST) (Entered: 05/23/2013)
5/23/2013	155	OPINION CORRECTION LETTER of USCA as to 150 Notice of Appeal filed by Laborers District Council Construction Industry Pension Fund, Cement Mason Local 526 Combined Funds (Attachments: # 1 Corrected Page, # 2 Cover Letter)(LST) (Entered: 05/23/2013)
5/28/2013	156	OPINION CORRECTION LETTER of USCA as to 150 , 153 and 155 Notice of Appeal filed by Laborers District

DATE	NO.	PROCEEDINGS
		Council Construction Industry Pension Fund, Cement Mason Local 526 Combined Funds (Attachments: # 1 Corrected page #13, # 2 Letter)(LMB) (Entered: 05/29/2013)
8/2/2013	157	MANDATE of USCA as to 150 Notice of Appeal filed by Laborers District Council Construction Industry Pension Fund, Cement Mason Local 526 Combined Funds (Attachments: # 1 Cover Letter)(LST) (Entered: 08/02/2013)
		* * *
10/10/2013	161	LETTER from Supreme Court of the U.S., petition for writ of certiorari was filed 10/4/2013 and placed on the docket 10/8/2013 as No. 13-435. Redmond K. Barnes, Case Analyst. (TJZ) (Entered: 10/11/2013)
		* * *
3/3/2014	165	WRIT OF CERTIORARI Issued by US Supreme Court re 161 LETTER (LST) (Entered: 03/03/2014)

Relevant Docket Entries,
U.S. Court of Appeals, Sixth Circuit
Docket No. 07-6379

DATE	NO.	PROCEEDINGS
11/26/2007	1	Civil Case Docketed. Notice filed by Appellants Alaska Electrical Pension Fund, Cement Mason Local 526 Combined Funds and Indiana State District Counsel of Laborers and Hod Carriers Pension and Welfare Fund. Transcript needed: y. (DS)
		* * *
5/12/2008	31	APPENDIX filed by Ms. Jennifer L. Gmitro, Ms. Shirley H. Huang, Mr. Eric A. Isaacson, Mr. Kevin L. Murphy and Mr. Henry Rosen for Indiana State District Counsel of Laborers and Hod Carriers Pension and Welfare Fund and Alaska Electrical Pension Fund, Cement Mason Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund Copies:5 (3 Volumes). Certificate of Service: 05/08/2008. (DS)
5/29/2008	32	APPELLEE FINAL BRIEF filed by Mr. William T. Conway, III, Mr. Douglas R. Dennis, Mr. Stephen M. Gracey, Mr. Harvey Kurzweil, Mr. Richard W. Reinthaler, Mr. William T. Robinson, III, Mr. John E. Schreiber and Mr. James P. Smith, III for Omnicare, Inc., Joel F. Gemunder

DATE	NO.	PROCEEDINGS
		and David W. Froesel, Jr.. Copies: 7. Certificate of Service: 05/28/2008. Argument Request: requested. (DS)
		* * *
6/2/2008	34	FINAL REPLY BRIEF filed by Ms. Jennifer L. Gmitro, Ms. Shirley H. Huang, Mr. Eric A. Isaacson, Mr. Kevin L. Murphy and Mr. Henry Rosen for Appellants Alaska Electrical Pension Fund, Cement Mason Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund. Certificate of Service:05/29/2008. (DS)
		* * *
7/14/2008	38	Substitute appellants' final brief, replacing the brief previously filed on June 2, 2008, filed by Ms. Jennifer L. Gmitro, Ms. Shirley H. Huang, Mr. Eric A. Isaacson, Mr. Kevin L. Murphy and Mr. Henry Rosen for Indiana State District Counsel of Laborers and Hod Carriers Pension and Welfare Fund and Appellants Alaska Electrical Pension Fund, Cement Mason Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund. Certificate of Service:07/11/2008. (DS)
		* * *

DATE	NO.	PROCEEDINGS
10/21/2009	64	OPINION and JUDGMENT filed: AFFIRMED in part, REVERSED in part, case is REMANDED, decision for publication pursuant to local rule 206. Martha Craig Daughtrey, Ronald Lee Gilman, Circuit Judges; Richard Mills (AUTHORING), U.S. District Judge for the Central District of Illinois. (LKM)
11/3/2009	66	PETITION for en banc rehearing filed by Mr. Eric Alan Isaacson for Indiana State District Counsel of Laborers and Hod Carriers Pension and Welfare Fund and Alaska Electrical Pension Fund, Cement Mason Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund and Mr. Eric Alan Isaacson for Alaska Electrical Pension Fund, Cement Mason Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund. Certificate of Service: 11/03/2009. (EAI)
12/16/2009	68	ORDER filed denying petition for en banc rehearing [66] filed by Mr. Eric Alan Isaacson for Indiana State District Counsel of Laborers and Hod Carriers Pension and Welfare Fund and Cement Mason Local 526 Combined Funds, Alaska Electrical Pension Fund, Laborers District Council Construction Industry

DATE	NO.	PROCEEDINGS
		Pension Fund, Cement Mason Local 526 Combined Funds, Alaska Electrical Pension Fund and Laborers District Council Construction Industry Pension Fund. Martha Craig Daughtrey, Ronald Lee Gilman, Circuit Judges; Richard Mills, District Judge. (BLH)
1/13/2010	71	MANDATE ISSUED with no costs taxed. (DS)
		* * *
5/21/2010	75	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Laborers District Council Construction Industry Pension Fund. Supreme Court Case No:09-1400, 05/14/2010. (SWH)
11/8/2010	79	U.S. Supreme Court letter and order filed dismissing certiorari petition pursuant to Rule 46.1 of the Rules of the Supreme Court. [75] filed by Laborers District Council Construction Industry Pension Fund. Supreme Court Case No: 09-1400, 11/05/2010. (SWH)

Relevant Docket Entries,
U.S. Court of Appeals, Sixth Circuit
Docket No. 12-5287

DATE	NO.	PROCEEDINGS
3/15/2012	1	Civil Case Docketed. Notice filed by Appellants Cement Mason Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund. Transcript needed: y. (JB)
		* * *
6/4/2012	33	APPELLANT BRIEF filed by Mr. Eric Alan Isaacson for Cement Masons Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund. Certificate of Service:06/04/2012. Argument Request: requested. (EAI)
		* * *
7/27/2012	36	APPELLEE BRIEF filed by Mr. William T. Robinson, III for Omnicare, Inc., Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, Edward L. Hutton and Sandra E. Laney. Certificate of Service: 07/27/2012. Argument Request: requested. (WTR)
8/13/2012	39	REPLY BRIEF filed by Attorney Mr. Eric Alan Isaacson for Appellants Cement Masons Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund. Certificate of Service: 08/13/2012. (EAI)

DATE	NO.	PROCEEDINGS
		* * *
1/10/2013	48	ADDITIONAL CITATION filed by Mr. Harvey Kurzweil for Omnicare, Inc., Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, Edward L. Hutton and Sandra E. Laney. Certificate of Service: 01/10/2013. (HK)
		* * *
5/23/2013	64	OPINION and JUDGMENT filed : The district court's judgment with regard to Defendants' legal compliance claims is REVERSED and REMANDED. The judgment with respect to Plaintiffs' GAAP-based claims is AFFIRMED. Decision for publication. R. Guy Cole, Jr. (AUTHORING) and Richard Allen Griffin, Circuit Judges; and James S. Gwin (CONCURRING), U.S. District Judge for the Northern District of Ohio, sitting by designation.* Pursuant to the opinion correction letter of 5/23/13 and 5/28/13, the opinion and judgment attached to this entry have been corrected.–[Edited 05/23/2013 by CL] (CL)
5/23/2013	65	OPINION CORRECTION LETTER sent indicating a correction to page 17 of the published opinion filed May 23, 2013. (CL)

DATE	NO.	PROCEEDINGS
5/28/2013	67	OPINION CORRECTION LETTER sent indicating corrections to page 13 of the published opinion filed May 23, 2013. (CL)
6/6/2013	68	PETITION for en banc rehearing filed by Mr. William T. Robinson, III for Omnicare, Inc., Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, Edward L. Hutton and Sandra E. Laney. Certificate of Service: 06/06/2013. (WTR)
6/19/2013	77	LETTER SENT to Mr. Eric Alan Isaacson for Cement Masons Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund, notifying that he is directed to respond to petition for en banc rehearing filed by Mr. William T. Robinson, III. Response due 07/03/2013. (BLH)
7/3/2013	79	RESPONSE to petition for en banc rehearing, [68], previously filed by filed by Mr. William T. Robinson, III in 12-5287. Response filed by Mr. Eric Alan Isaacson for Cement Masons Local 526 Combined Funds and Laborers District Council Construction Industry Pension Fund. Certificate of service: 07/03/2013. (EAI)
7/23/2013	81	ORDER filed denying petition for en banc rehearing [68] filed by Mr. William T. Robinson, III. R. Guy Cole,

DATE	NO.	PROCEEDINGS
		Jr., and Richard Allen Griffin, Circuit Judges; and James S. Gwin, District Judge. (BLH)
8/2/2013	83	MANDATE ISSUED with no costs taxed. (JB)
10/10/2013	85	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Omnicare, Inc.. Supreme Court Case No:13-435, 10/04/2013. (CL)
3/3/2014	86	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [85] filed by Omnicare, Inc... Supreme Court Case No: 13-435, 03/03/2014.. (CL)

719 F.3d 498

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

No. 12-5287

INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, on behalf of itself and all others similarly situated,

Plaintiff,

Cement Masons Local 526 Combined Funds; Laborers District Council Construction Industry Pension Fund,

Plaintiffs-Appellants,

v.

OMNICARE, INC.; Joel F. Gemunder; David W. Froesel, Jr.; Cheryl D. Hodges; Edward L. Hutton; Sandra E. Laney,

Defendants-Appellees.

Argued: Jan. 15, 2013.

Decided and Filed: May 23, 2013.

Rehearing and Rehearing En Banc Denied July 23, 2013.

Attorneys and Law Firms

ARGUED: Eric Alan Isaacson, Robbins Geller Rudman & Dowd LLP, San Diego, California, for Appellants. Harvey Kurzweil, Winston & Strawn LLP, New York, New York, for Appellees. ON BRIEF: Eric

Alan Isaacson, Henry Rosen, Jennifer L. Gmitro, Amanda M. Frame, Robbins Geller Rudman & Dowd LLP, San Diego, California, for Appellants. Harvey Kurzweil, Richard W. Reinthaler, John E. Schreiber, Winston & Strawn LLP, New York, New York, Wm. T. Robinson III, Michael E. Nitardy, Frost Brown Todd LLC, Florence, Kentucky, for Appellees.

Before: COLE and GRIFFIN, *Circuit Judges*; GWIN, *District Judge*.*

OPINION

COLE, J., delivered the opinion of the court in which GRIFFIN, J., and GWIN, D.J., joined. GWIN, J. (pp. 510-11), delivered a separate concurring opinion.

COLE, *Circuit Judge*

Plaintiffs, all Omnicare investors, appeal the dismissal of their securities suit under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k (2010), against Defendants Omnicare, Inc., its officers, and directors. Plaintiffs allege that Defendants made material misstatements and/or omissions in a Registration Statement filed with the Securities and Exchange Commission in connection with a December 2005 public stock offering. The district court held that Plaintiffs had not adequately pleaded knowledge of wrongdoing on the part of Defendants and dismissed the complaint for failure to state a claim upon which relief can be granted. Plaintiffs seek reversal of the district court's dismissal order on the grounds that § 11 is a strict liability provision. For the following reasons, we REVERSE and REMAND in part and AFFIRM in part.

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

I.

Defendant Omnicare is the nation's largest provider of pharmaceutical care services for the elderly and other residents of long-term care facilities in the United States and Canada. *Ind. State Dist. Council v. Omnicare Inc.*, 583 F.3d 935, 938 (6th Cir.2009) (hereinafter "*Omnicare I*"); *Ind. State Dist. Council v. Omnicare Inc.*, 527 F.Supp.2d 698, 700-01 (E.D.Ky.2007). During the relevant time period, Defendant Joel Gemunder was Omnicare's Chief Executive Officer; Defendant David Froesel was Omnicare's Chief Financial Officer and a Senior Vice President; Defendant Cheryl Hodges was Omnicare's Secretary and a Senior Vice President; Defendant Edward Hutton was Chairman of the Board of Directors;[1] and Defendant Sandra Laney was a Director.

Plaintiffs are investors who purchased Omnicare securities in a December 15, 2005, public offering. In conjunction with the public offering, Omnicare offered 12.8 million shares of common stock and made related filings with the Securities and Exchange Commission. These filings were incorporated into a Registration Statement which is central to the current litigation. Plaintiffs did not hold the stock long. They sold all of these securities by January 31, 2006.

Plaintiffs seek relief under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k. Section 11 provides a remedy for investors who have acquired securities under a registration statement that was materially misleading or omitted material information. It imposes liability on issuers and signers of registration statements containing untrue statements or omissions of material

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[1] According to Defendants, Mr. Hutton is deceased.

fact. 15 U.S.C. § 77k(a). Section 11 also imposes liability on the directors of the issuer. *Id.* at § 77k(a)(2).

According to the Third Amended Complaint,[2] Omnicare was engaged in a variety of illegal activities including kickback arrangements with pharmaceutical manufacturers and submission of false claims to Medicare and Medicaid. Plaintiffs allege that representations in the Registration Statement were material, untrue and misleading because they effectively concealed Omnicare's illegal activities from its investors. According to the Plaintiffs, the Registration Statement stated "that [Omnicare's] therapeutic interchanges were meant to provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed" and that its contracts with drug companies were "*legally and economically valid* arrangements that bring value to the healthcare system and patients that we serve." Plaintiffs claim that given Omnicare's alleged illegal activities, these and other statements indicating compliance with the law were misleading. Specifically, Plaintiffs allege that these statements of "legal compliance" made in the Registration Statement were material, false and misleading, and therefore in violation of § 11.

Furthermore, Plaintiffs allege that Omnicare failed to comply with Generally Accepted Accounting Principles ("GAAP"), such that the financial statements filed in connection with the December 2005 public offering substantially overstated the company's

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[2] Although the Third Amended Complaint is titled "Second Amended Consolidated Complaint," it is the third amendment to the original complaint in this litigation. The parties and the district court have consistently referred to it as the "Third Amended Complaint."

revenue. Therefore, according to Plaintiffs, the financial statements contained material misstatements and omissions in violation of § 11.

Plaintiffs filed this case in the United States District Court for the Eastern District of Kentucky in February 2006 as a putative securities class action, alleging claims for violations of § 10(b), Rule 10b-5 and § 20(a) of the Securities and Exchange Act of 1934. *Omnicare I*, 583 F.3d at 939. A class was never certified. Plaintiffs later amended the complaint, adding a claim under § 11 for material misstatements and omissions in the Registration Statement. That § 11 claim is the basis of the instant appeal.

Defendants moved to dismiss the complaint on a variety of grounds. On October 12, 2007, the district court granted Defendants' motion and dismissed the complaint in its entirety. *Omnicare*, 527 F.Supp.2d at 712. With respect to the § 10(b), Rule 10b-5 and § 11 claims, the district court determined that Plaintiffs had failed to plead loss causation—the causal connection between a defendant's misconduct and the plaintiff's loss. *Id.* at 704-05. The claim made under § 20(a) was dismissed as well. *Id.* at 711. Plaintiffs appealed.

On October 21, 2009, this Court affirmed the judgment of the district court with respect to all claims except the § 11 claim. We held that "loss causation" is not an element of a § 11 claim but is instead an affirmative defense. *Omnicare I*, 583 F.3d at 947. Accordingly, we determined that the district court had erred by requiring Plaintiffs to plead loss causation in order to state their § 11 claim. We remanded the case to district court for further analysis. *Id.* at 948.

Plaintiffs pursued a writ for certiorari, which they later dismissed, and then moved for leave to amend the complaint in order to re-plead the § 11 claim. The motion was granted. The Third Amended Complaint encompasses two types of § 11 allegations: (1) material misstatements and omissions made with reference to the statements of "legal compliance"; and (2) material misstatements and omissions in reference to GAAP. Defendants filed a motion to dismiss the Third Amended Complaint.

On February 13, 2012, the district court granted Defendants' motion, concluding that because the Plaintiffs' § 11 claim "sounds in fraud," it was subject to but failed to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). The court furthermore held that, for both claims asserted under § 11, Plaintiffs were required, but failed to plead, knowledge of falsity on the part of the Defendants. Because the court found that the complaint failed to satisfy the pleading standards of Rule 9(b), and because Plaintiffs had not sufficiently pleaded Defendants' knowledge of falsity, the complaint was dismissed. Plaintiffs again appealed.

II.

Whether the district court properly dismissed a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is a question of law subject to de novo review. *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir.2006). The court must construe the complaint in a light most favorable to the plaintiff and accept all factual allegations as true. *Id.* at 688. The factual allegations must "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Stated otherwise, the Rule 12(b)(6) standard requires that the plaintiff

provide "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. 1955. A complaint must "contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir.2005).

While notice pleading requirements are based on Rule 8, *see Twombly*, 550 U.S. at 555, 127 S.Ct. 1955, claims for fraud are held to the heightened pleading standard of Rule 9(b). We held in *Omnicare I* that, although § 11 claims do not require pleading of scienter, Rule 9(b) pleading standards still apply to § 11 claims that sound in fraud. *Omnicare I*, 583 F.3d at 948. We furthermore held that the § 11 claims pleaded by Plaintiffs in the instant case met this requirement. *Id.*

Plaintiffs argue that, since this Court's decision in *Omnicare I*, they have amended their complaint to abandon all claims "that could be construed as alleging fraud or intentional or reckless misconduct" and that, as a result, Rule 9(b) no longer applies. They base this argument primarily on a disclaimer that has been added to the complaint stating: "Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on the theories of strict liability and negligence under the Securities Act." This one-sentence disclaimer, however, does not achieve Plaintiffs' desired result. *See Cal. Pub. Emps. Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160 (3rd Cir.2004) ("[A]n examination of the factual allegations that support Plaintiffs' section 11 claims establishes that the claims are indisputably immersed in . . . fraud. The one-sentence disavowment of fraud contained [in] . . . the . . . [c]omplaint does not

require us to infer" otherwise) (footnote omitted). The basis of Plaintiffs' allegations has not changed since *Omnicare I*, and therefore the heightened pleading standard of Rule 9(b) still applies to the § 11 claims.

Complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). In order to meet the "particularity" requirement of Rule 9(b), "a plaintiff [must] allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir.2006) (internal quotation marks and citation omitted); *see also Omnicare I*, 583 F.3d at 942-43. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b).

III.

Plaintiffs have brought two separate § 11 claims in their Third Amended Complaint: one for material misstatements and/or omissions of legal compliance and one for Defendants' alleged failure to comply with GAAP such that the Registration Statement contained material misstatements and/or omissions. We address each of these claims in turn.

A.

1.

Plaintiffs allege that Omnicare's statements of legal compliance led investors to believe that Omnicare—which was allegedly engaged in illegal activities—was in compliance with the law. Plaintiffs assert that these statements of legal compliance made in the

Registration Statement were therefore material, untrue, and misleading, in violation of § 11.

The district court held that Plaintiffs were required to plead that Defendants knew that the statements of legal compliance were false at the time they were made. Because the court found that Plaintiffs failed to plead knowledge of falsity, it dismissed the complaint for failure to state a claim. On appeal, Plaintiffs argue that § 11 provides for strict liability and it was therefore inappropriate for the district court to require them to plead knowledge in connection with their § 11 claim. We agree.

Section 11 provides for the imposition of liability if a registration statement, as of its effective date, "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). It provides a remedy for investors who have acquired securities pursuant to a registration statement that was materially misleading or omitted material information. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). Section 11 provides for strict liability, and does not require a plaintiff to plead a defendant's state of mind. *See id.* at 382, 103 S.Ct. 683. Plaintiffs contend that the argument should end here and that the district court erred by requiring them to plead state of mind.

Defendants respond, however, that the issue is not so simple. Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, have elements parallel to § 11, prohibiting "fraudulent, material misstatements or omissions in connection with the sale or purchase of a security." *Miller v. Champion Enters.*

Inc., 346 F.3d 660, 671 (6th Cir.2003) (internal quotation marks and citation omitted). This Court held in *Omnicare I*—for purposes of § 10(b) and Rule 10b-5—that legal compliance statements are "soft information." *See Omnicare I*, 583 F.3d at 945 (citation omitted). Soft information includes matters of opinion and predictions. There is no duty to disclose soft information unless it is "virtually as certain as hard facts." *In re Sofamor Danek Grp. Inc.*, 123 F.3d 394, 401-02 (6th Cir.1997) (internal quotation marks and citations omitted). Because there is generally no duty to disclose soft information for purposes of § 10(b) and Rule 10b-5, a defendant corporation that chooses to keep *completely silent* regarding soft information cannot be held liable for a material omission under those provisions. *See id.*

A thornier issue arises when a defendant chooses to disclose some soft information, as occurred in the instant case. Defendants were not completely silent, but instead spoke on issues of legal compliance. With regard to § 10(b) and Rule 10b-5, this Court has reasoned:

> [T]he protections for soft information end where speech begins . . . [H]ow can a rule of non-disclosure apply to a company's disclosure? If—as defendants contend—the protection for soft information remains intact even after a company speaks on an emerging issue, the speaker could choose which contingencies to expose and which to conceal. On any subject falling short of reasonable certainty, then, a company could offer a patchwork of honesty and omission. This proposition is untenable . . .

Helwig v. Vencor, Inc., 251 F.3d 540, 560 (6th Cir.2001) (en banc), *abrogated on other grounds by*

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In *Omnicare I*, this Court addressed Plaintiffs' § 10(b) and Rule 10b-5 claims regarding statements of legal compliance. The Court reasoned, citing *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 831 (8th Cir.2003), and Helwig, that Plaintiffs could not stop at pleading that Defendants' disclosures were untruthful. *See Omnicare I*, 583 F.3d at 945. We held that in order for § 10(b) and Rule 10b-5 liability to attach to Omnicare's general assertions of legal compliance, the complaint must "adequately plead[ ] that the defendants knew the statements were untruthful" at the time they were made. *Id.* at 945 (internal quotation marks and citation omitted). The *Omnicare I* panel found that Plaintiffs had not adequately pleaded any allegation that Defendants knew that the legal compliance statements were false when made and accordingly held that Plaintiffs had failed to state a claim. *Id.* at 946-47.

The *Omnicare I* panel relied heavily on *Kushner*, which had in turn relied heavily on our *Helwig* and *Sofamor* opinions. *See Omnicare I*, 583 F.3d at 945 (citing *Kushner*, 317 F.3d at 831.). *Kushner* frames the knowledge of falsity pleading requirement as one of disclosure. *Kushner* does not appear to have distinguished between material misstatements and omissions under § 10b and Rule 10b-5. Although the primary issue in *Kushner* was whether defendants were liable for a material misstatement, the court began by commenting: "Before liability for non-disclosure can attach, the defendant must have violated an affirmative duty of disclosure." *Kushner*, 317 F.3d at 831 (internal quotation marks and citation omitted). Citing *Sofamor*, the court noted that there

is generally no duty to disclose soft information. When knowledge of falsity is shown, however, "[o]pinions cease to be soft information" and become hard facts. *Id.* At that point, the duty to disclose and liability for disclosure of false information under § 10b and Rule 10b-5 attach. *See id.* Although the court agreed that "even absent a duty to speak, a party who voluntarily discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully," it held that "[a]bsent a clear allegation that the defendants knew of the scheme and its illegal nature at the time they stated the belief that the company was in compliance with the law, there [was] nothing further to disclose." *Id.* (internal quotation marks and citation omitted). According to *Kushner*, under § 10b and Rule 10b-5 a defendant may only be liable for a material misstatement if she knew the statements were false and therefore knew there was something further to disclose.

Language in *Helwig* supports the view taken by the Eighth Circuit in *Kushner* for purposes of § 10b and Rule 10b-5. In *Helwig*, this Court stated: "With regard to future events, uncertain figures, and other so-called soft information, a company may choose silence or speech elaborated by the factual basis *as then known* . . ." 251 F.3d at 561 (emphasis added). In other words, a company that chooses to disclose soft information assumes the duty to do so fully and truthfully, but only to the extent that facts are known at the time the statements are made. *Helwig*, *Kushner* and *Omnicare I*, therefore appear to indicate that, in § 10(b) and Rule 10b-5 cases, a plaintiff must plead knowledge of falsity because there can be no liability for a material misstatement if a defendant was not aware there was anything further to disclose in order to correct the misstatement.

Defendants now argue that the same reasoning should apply under § 11 to the case at hand. We do not agree. Section 10(b) and Rule 10b-5 require a plaintiff to prove scienter, § 11 is a strict liability statute. It makes sense that a defendant cannot be liable for a fraudulent misstatement or omission under § 10(b) and Rule 10b-5 if he did not know a statement was false at the time it was made. The statement cannot be fraudulent if the defendant did not know it was false. Section § 11, however, provides for strict liability when a registration statement "contain[s] an untrue statement of a material fact." 15 U.S.C. 77k(a); *see Huddleston*, 459 U.S. at 382, 103 S.Ct. 683. No matter the framing, once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim.

It is immaterial that this issue has been framed as a disclosure requirement. Disclosed information can nevertheless be indisputably wrong. Under the language of § 10(b) and Rule 10b-5, a defendant may take shelter in the fact that she did not know there was anything further to disclose; it was not *fraudulent* for the defendant to fail to disclose anything further. A plaintiff therefore fails to state a claim if she has not pleaded knowledge of falsity. Under § 11, however, if the defendant discloses information that includes a material misstatement, that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of falsity.

Finally, Defendants urge us to follow *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir.2011). In *Fait*, a case similar to the instant one, the Second Circuit held "when a plaintiff asserts a claim under section 11 . . . based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the

extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." *Id.* at 110 (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991)). Defendants argue that in *Fait* the Second Circuit correctly interpreted and applied the Supreme Court opinion *Virginia Bankshares*, 501 U.S. 1083, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991), and this Court is bound to follow suit. *See also Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir.2009) (citing to *Virginia Bankshares* and holding that opinions can "give rise to a claim under section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading").

While Defendants are correct that we are bound by Supreme Court precedent, we see nothing in *Virginia Bankshares* that alters the outcome in the instant case, and we decline to follow the Second and Ninth Circuits as a result. Reserving the question of whether scienter is necessary to make out a § 14(a) claim, the Supreme Court held in *Virginia Bankshares* that a plaintiff may bring a claim under § 14(a) of the Securities and Exchange Act of 1934 for a material misstatement or omission even if the statement is vague and conclusory. *Virginia Bankshares*, 501 U.S. at 1093, 111 S.Ct. 2749 ("[S]uch conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading"); 15 U.S.C. § 78n(a). The Court furthermore held that a defendant's disbelief in his own statement is not enough, on its own, for a plaintiff to make out a claim for a material misstatement under § 14(a). *Id.* at 1090, 1095-96, 111 S.Ct. 2749. In other words, under § 14(a) a plaintiff is required to plead objective falsity in order

to state a claim; pleading belief of falsity alone is not enough. *Id.* at 1095-96, 111 S.Ct. 2749 ("proof of mere disbelief or belief undisclosed [standing alone] should not suffice for liability under § 14(a)"). In the instant case, the Plaintiffs have pleaded objective falsity. The *Virginia Bankshares* Court was not faced with and did not address whether a plaintiff must additionally plead knowledge of falsity in order to state a claim. *Id.* It therefore does not impact our decision today.

The Court, *at the same point* that it declined to discuss scienter, also explicitly limited its discussion to statements of opinion and belief that it presumed were made with knowledge of falsity: "[W]e interpret the jury verdict as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made." *Id.* at 1090, 111 S.Ct. 2749. A footnote to this sentence reserves "the question whether scienter [is] necessary for liability . . . under § 14(a)." *Id.* at 1090 n. 5, 111 S.Ct. 2749. The connection of these two statements indicates that the *Virginia Bankshares* Court itself tied the knowledge of falsity requirement to scienter but explicitly declined to address the issue further. Instead, it assumed the jury in the case had already found knowledge of falsity—whether necessary or not—and proceeded from there. *See id.* at 1090, 111 S.Ct. 2749.

The Second and Ninth Circuits have read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this § 14(a) case into a § 11 context.

Since the Supreme Court assumed knowledge of falsity for the purposes of the discussion in *Virginia*

Bankshares, § 14(a) was effectively treated as a statute that required scienter.[3] The *Virginia Bankshares* discussion, therefore, has very limited application to § 11; a provision which the Court has already held to create strict liability. *See Huddleston*, 459 U.S. at 381-82, 103 S.Ct. 683.

The Second Circuit reads Justice Scalia's concurring opinion as support for their interpretation of *Virginia Bankshares*. *See Fait*, 655 F.3d at 111 (citing *Virginia Bankshares*, 501 U.S. at 1108-1109, 111 S.Ct. 2749). Justice Scalia wrote: "As I understand the Court's opinion, the statement 'In the opinion of the Directors, this is a high value for the shares' would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise." *Virginia Bankshares*, 501 U.S. at 1108-09, 111 S.Ct. 2749. We do not think it is necessary to ignore Justice Scalia's interpretation of the majority *Virginia Bankshares* opinion; we only believe it is unreasonable to extend it to this case and § 11. Because the Court chose to limit its discussion to "statements of belief and opinion . . . made with knowledge that" the statements were false, *id.* at 1090, 111 S.Ct. 2749, any musings regarding mens rea are dicta. The Supreme Court was not faced with the question of knowledge of falsity requirements. Justice Souter carefully declined to discuss strict liability in his introduction to the majority opinion, and it would be unwise for this Court to add an element to § 11 claims based on little more than a tea-leaf reading in a § 14(a) case. While there are contexts in which dicta

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[3] In this Circuit § 14(a) does in fact require proof of scienter to state a claim. *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir.1980).

provides valuable insight into the Court's outlook, we must be careful in how it is extended and applied. This is a context in which extension of dicta is most dangerous. Even Justice Scalia's seemingly direct statement must be read in the context of § 14(a)—a non-strict liability statute. In writing the opinion, the Court could not have intended that musings regarding the requirement would later be applied to an unrelated statute. We therefore refuse to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon § 11 claims.

2.

We construe facts alleged in the complaint in the light most favorable to the Plaintiffs and accept all factual allegations as true. *Kottmyer*, 436 F.3d at 688; *see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). But complaints subject to Rule 9(b) must plead "with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). Defendants argue that Plaintiffs have not met their burden under Rule 9(b) due to their reliance on *qui tam* complaints and confidential sources. We disagree.

Defendants first argue that Plaintiffs' citations to *qui tam* complaints are insufficient to sustain their claim. In order to support this argument, Defendants first contend that Plaintiffs have failed to conduct a "reasonable investigation" as required under Rule 11. *See Albright v. Upjohn Co.*, 788 F.2d 1217, 1220 (6th Cir.1986); *see also* Fed.R.Civ.P. 11. This argument, however, was also raised in district court, and the court, at its discretion, did not issue sanctions or strike the relevant portions of the Third Amended Complaint. *See Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass'n*, 524 F.3d 726, 739 (6th

Cir.2008) ("We review a district court's decision to grant or deny sanctions . . . arising from . . . Rule 11, under the abuse-of-discretion standard"). Rule 11 sanctions are a question of "whether the . . . attorney's conduct was reasonable under the circumstances." *Id.* (internal quotation marks and citations omitted). We see no reason to conclude that the district court abused its discretion for purposes of Rule 11.

Defendants next argue that allegations based on *qui tam* complaints nevertheless cannot withstand a motion to dismiss under Rule 9(b). Defendants cite to several cases in which courts, after noting reliance on third-party actions, have dismissed complaints under Rule 9(b). We do not believe this case necessitates such action. The only Sixth Circuit opinion cited by Defendants, *Konkol v. Diebold, Inc.*, 590 F.3d 390 (6th Cir.2009), *abrogated on other grounds by Frank v. Dana Corp.*, 646 F.3d 954 (6th Cir.2011), is inapposite. In *Konkol*, this Court began by determining that the complaint, in a § 10b and Rule 10b-5 case, was insufficient to state a claim—on grounds that had nothing to do with third-party complaints.[4] *Id.* at 397-400. We then proceeded to address the plaintiffs' list of defenses to that holding, finding each of them insufficient. *Id.* at 400-04. One of these defenses was the existence of government investigations into the defendants' actions. *Id.* at 401-02. We stated that "[a]lthough a government investigation is not altogether irrelevant to the . . . analysis . . . [g]overnment investigations can result from any number of

[4] We also note that plaintiffs in *Konkol* were not only subject to Rule 9(b) but also to the higher more exacting pleading standards of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b), which are inapplicable in this case. *Konkol*, 590 F.3d at 396.

causes, and the investors have not pointed to any facts suggesting that the SEC investigation" supports their claim. *Id.* at 402.

The same is not true in the instant case. Plaintiffs do not simply cite to the *existence* of government investigations, they allege numerous reasons why the facts of those investigations support their claim. In *Konkol*, the plaintiffs relied on the fact that government agencies had dedicated resources to investigating defendants, and they therefore concluded, "as a matter of common sense," that something must be amiss. *Id.* at 401-02. The Plaintiffs here jump to no such conclusions. Instead of relying on the mere existence of *qui tam* complaints or investigations, they comprehensively discuss how the details are relevant to their own complaint, and give extensive rationale for that support. We find the other cases cited by Defendants similarly inapplicable.

Defendants' second argument is that the confidential witness statements in the complaint should be "steeply discounted." *See Omnicare I*, 583 F.3d at 946 (discounting the weight of the confidential witness statements). Even giving the confidential witness statements minimal weight, however, we do not doubt that sufficient facts have been presented to "raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. We therefore conclude that Plaintiffs have adequately met the particularity requirement of Rule 9(b).

B.

Plaintiffs also appeal the dismissal of their § 11 claim for GAAP-based misstatements and omissions. The district court held that Plaintiffs failed to plead knowledge of falsity and therefore failed to state a

claim. Defendants argue that we should affirm because the GAAP allegations are based on "soft information." *Cf. In re Almost Family, Inc. Sec. Litig.*, No. 3:10-CV-00520-H, 2012 WL 443461, at *4 (W.D.Ky. Feb. 10, 2012) (holding that some GAAP allegations were soft information because the allegations in plaintiff's complaint focused on defendants' beliefs about accounting numbers, not on the actual data they reported). We disagree that Plaintiffs' GAAP allegations qualify as soft information. Plaintiffs' allegation is that Defendants' hard numbers were incorrect. These are allegations of hard facts and do not require pleading knowledge of falsity under any standard. Even if we were to hold that the GAAP allegations are soft information, however, plaintiffs are not required to plead knowledge of falsity under § 11 to make out a claim for a material misstatement. Therefore, the district court erred in requiring Plaintiffs to plead knowledge of falsity with regard to the GAAP violations.

However, Plaintiffs still have to meet the particularity requirements of Rule 9(b) in pleading that GAAP violations occurred. As this Court noted in *Omnicare I*, Plaintiffs' GAAP allegations appear to contain some factual holes. In assessing Plaintiffs' 10(b) and 10b-5 claims, the *Omnicare I* Court stated:

> Although Plaintiffs list numerous alleged violations of GAAP rules, the complaint nowhere suggests how or when any of these alleged accounting improprieties were disclosed. Rather, Plaintiffs argue that they were implicitly disclosed because Omnicare's allegedly illegal conduct (drug recycling, etc.) translated into accounting violations. Thus, when news of the government raids appeared, the accounting

> statements were thrown into question by extension. This causation theory, however, rests entirely on speculation and is substantially undercut both by the lack of any financial restatements on Omnicare's part and by the willingness of third-party auditors to continue to certify Omnicare's GAAP compliance.

Omnicare I, 583 F.3d at 945.

While that analysis concerned whether Plaintiffs had adequately alleged "loss causation" with particularity, it is applicable to whether they have pleaded a GAAP violation at all. Plaintiffs' Third Amended Complaint alleges many GAAP-based violations, but as the Court noted in *Omnicare I*, the details of the accounting violations remain unclear. Although Plaintiffs' complaint has been amended since our previous opinion, Plaintiffs have not pointed to any updated information that would resolve these issues.

C.

Defendants urge us to affirm the district court on the alternative ground that the affirmative defense of loss causation is evident on the face of the complaint. "Loss causation" refers to the causal connection between the defendant's material misrepresentation or omission and the plaintiff's loss. *See Omnicare*, 527 F.Supp.2d at 704-05. When an affirmative defense is evident on the face of a complaint, the complaint may be subject to dismissal under Rule 12(b)(6). *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). Furthermore, this Court held in *Omnicare I* that the complaint did not adequately plead loss causation for the 10(b) and Rule 10b-5 claims. *Omnicare I*, 583 F.3d at 943-47.

Loss causation is an element of a § 10(b) and Rule 10b-5 claim but only an affirmative defense to a § 11 claim. The Omnicare I panel reversed the district court on the § 11 claim on exactly that basis. Had the Court determined that the affirmative defense of loss causation was evident from the face of the pleadings, it would have affirmed and dismissed the case. Instead, it chose to remand to the district court for further analysis. *Id.* at 948. The district court, having declined to reach this issue on remand, has not yet addressed the merits of the argument. Although the complaint has been amended since *Omnicare I* was decided, the Defendants urge us to find loss causation on the basis of language in the outdated complaint. We therefore have no more information on this issue now than we had at the time of the *Omnicare I* opinion.

"When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge v. Williams*, 397 U.S. 471, 476 n. 6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *see also Lewis v. Philip Morris Inc.*, 355 F.3d 515, 534 (6th Cir.2004) (remanding due to the fact-intensive nature of the review required). The district court in this case has had many years to familiarize itself with the facts of this case and is in a stronger position than this Court to conduct the fact-intensive analysis this ruling requires.

IV.

For the foregoing reasons, we REVERSE the district court with regard to Plaintiffs' legal compliance claims and REMAND for further proceedings consistent with this opinion; and AFFIRM with respect to Plaintiffs' GAAP-based claims.

GWIN, *District Judge*, concurring.

I concur in the majority's thoughtful and comprehensive opinion. I write separately to make clear that the district court retains the statutory and inherent discretion to resurrect previously dismissed claims and previously dismissed parties should later discovered evidence warrant it. See *Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 Fed.Appx. 949, 959 (6th Cir.2004) ("District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment.").

Rule 54(b) of the Federal Rules of Civil Procedure provides the statutory vehicle for such revision. If a court decides fewer than all the claims presented, as is the case here, dismissed claims can be revived until the entry of final judgment. Fed.R.Civ.P. 54(b) ("[A]ny order . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). The district court's ability to reconsider past rulings must be tempered by "the sound public policy that litigation be decided and then put to an end." *Petition of U.S. Steel Corp.*, 479 F.2d 489, 494 (6th Cir.1973).

In deciding whether to revisit previously dismissed claims or parties, a district court may consider "(1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rodriguez*, 89 Fed.Appx. at 959. (citing *Reich v. Hall Holding Co.*, 990 F.Supp. 955, 965 (N.D.Ohio 1998)). Simple reargument of evidence that had been available at the time of the earlier decision is usually not enough to warrant reconsideration. *Id.*

Rule 54(b) is particularly relevant in suits subject to the Private Securities Litigation Reform Act (PSLRA). The PSLRA, passed in 1995 after considerable lobbying by corporate and investment interests, mandates heightened pleading requirements to avoid dismissal. As one scholar notes, the PSLRA "created a super-heightened pleading standard for certain aspects of securities claims and deferred discovery until after resolution of an inevitably protracted motion to dismiss . . ." Arthur Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 11 (2010). Such motions to dismiss, as is the case here, often include questions of "scienter, loss causation, reliance, and materiality—questions that formerly would have been considered trial worthy." *Id.* Remarkably, the PSLRA imposes what amounts to a probabilistic pleading standard for scienter. *See Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (defining the "strong inference" of scienter under the PSLRA as "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent").

If newly-found evidence in a PSLRA case supports a previously dismissed claim's scienter (or materiality, or reliance, or loss causation) allegation, the district court could allow the claim to be revived. District courts are charged with enforcing rules "to secure the just, speedy, and inexpensive determination" of an action. Fed.R.Civ.P. 1. There's a reason that "just" precedes "speedy."

Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures
Subchapter I. Domestic Securities (Refs & Annos)
15 U.S.C.A. § 77z-2
§ 77z-2. Application of safe harbor for forward-looking statements

15 U.S.C.A. § 77z-2. Application of safe harbor for forward-looking statements

(a) Applicability

This section shall apply only to a forward-looking statement made by—

(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 78m(a) or 78o(d) of this title;

(2) a person acting on behalf of such issuer;

(3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or

(4) an underwriter, with respect to information provided by such issuer or information derived from information provided by the issuer.

(b) Exclusions

Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement—

(1) that is made with respect to the business or operations of the issuer, if the issuer—

(A) during the 3-year period preceding the date on which the statement was first made—

(i) was convicted of any felony or misdemeanor described in clauses (i) through (iv) of section 78o(b)(4)(B) of this title; or

(ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that—

(I) prohibits future violations of the antifraud provisions of the securities laws;

(II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or

(III) determines that the issuer violated the antifraud provisions of the securities laws;

(B) makes the forward-looking statement in connection with an offering of securities by a blank check company;

(C) issues penny stock;

(D) makes the forward-looking statement in connection with a rollup transaction; or

(E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is—

(A) included in a financial statement prepared in accordance with generally accepted accounting principles;

(B) contained in a registration statement of, or otherwise issued by, an investment company;

(C) made in connection with a tender offer;

(D) made in connection with an initial public offering;

(E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or

(F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 78m(d) of this title.

(c) Safe harbor

(1) In general

Except as provided in subsection (b) of this section, in any private action arising under this subchapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) of this section shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity, was—

(I) made by or with the approval of an executive officer of that entity, and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) Oral forward-looking statements

In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 78m(a) or 78o(d) of this title, or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied—

(A) if the oral forward-looking statement is accompanied by a cautionary statement—

(i) that the particular oral statement is a forward-looking statement; and

(ii) that the actual results could differ materially from those projected in the forward-looking statement; and

(B) if—

(i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to differ materially from those in the forward-looking statement is contained in a

readily available written document, or portion thereof;

(ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and

(iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) Availability

Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) Effect on other safe harbors

The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g) of this section.

(d) Duty to update

Nothing in this section shall impose upon any person a duty to update a forward-looking statement.

(e) Dispositive motion

On any motion to dismiss based upon subsection (c)(1) of this section, the court shall consider any statement cited in the complaint and cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant.

(f) Stay pending decision on motion

In any private action arising under this subchapter, the court shall stay discovery (other than discovery that is specifically directed to the applicability of the exemption provided for in this section) during the pendency of any motion by a defendant for summary judgment that is based on the grounds that—

(1) the statement or omission upon which the complaint is based is a forward-looking statement within the meaning of this section; and

(2) the exemption provided for in this section precludes a claim for relief.

(g) Exemption authority

In addition to the exemptions provided for in this section, the Commission may, by rule or regulation, provide exemptions from or under any provision of this subchapter, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission.

(h) Effect on other authority of Commission

Nothing in this section limits, either expressly or by implication, the authority of the Commission to exercise similar authority or to adopt similar rules and regulations with respect to forward-looking statements under any other statute under which the Commission exercises rulemaking authority.

(i) Definitions

For purposes of this section, the following definitions shall apply:

(1) Forward-looking statement

The term "forward-looking statement" means—

(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;

(C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission;

(D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);

(E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or

(F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

(2) Investment company

The term "investment company" has the same meaning as in section 80a-3(a) of this title.

(3) Penny stock

The term "penny stock" has the same meaning as in section 78c(a)(51) of this title, and the rules and regulations, or orders issued pursuant to that section.

(4) Going private transaction

The term "going private transaction" has the meaning given that term under the rules or regulations of the Commission issued pursuant to section 78m(e) of this title.

(5) Securities laws

The term "securities laws" has the same meaning as in section 78c of this title.

(6) Person acting on behalf of an issuer

The term "person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

(7) Other terms

The terms "blank check company", "roll-up transaction", "partnership", "limited liability company", "executive officer of an entity" and "direct participation investment program", have the meanings given those terms by rule or regulation of the Commission.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

[X] ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2004 OR

[ ] TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____.

Commission File No. 1-8269

OMNICARE, INC.

(Exact Name of Registrant as Specified in Its Charter)

Delaware	31-1001351
(State or Other Jurisdiction of Incorporation or Organization)	(I.R.S. Employer Identification No.)

OMNICARE, INC.
1600 RIVERCENTER II
100 EAST RIVERCENTER BOULEVARD
COVINGTON, KENTUCKY 41011
(Address of Principal Executive Offices)
859-392-3300
(Registrant's Telephone Number,
Including Area Code)
Securities registered pursuant to
Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on which Registered
Common Stock ($1.00 Par Value)	New York Stock Exchange
Preferred Share Purchase Rights (No Par Value)	New York Stock Exchange
4.00% Trust Preferred Income Equity Redeemable Securities issued by Omnicare Capital Trust I and guaranteed by Omnicare, Inc.	New York Stock Exchange
Series B 4.00% Trust Preferred Income Equity Redeemable Securities issued by Omnicare Capital Trust II and guaranteed by Omnicare, Inc.	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that

the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes [X] No [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [ ]

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b-2 of the Exchange Act). Yes [X] No [ ]

Aggregate market value of the registrant's voting stock held by non-affiliates, based upon the closing price of said stock on the New York Stock Exchange Composite Transaction Listing on the last business day of the registrant's most recently completed second fiscal quarter (i.e., June 30, 2004) ($42.81 per share): $4,316,217,861.

As of January 31, 2005, the registrant had 104,549,073 shares of Common Stock outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of Omnicare, Inc.'s ("Omnicare", the "Company" or the "Registrant") definitive Proxy Statement for its 2005 Annual Meeting of Stockholders, to be held May 17, 2005, are incorporated by reference into Part III of this report. Definitive copies of its 2005 Proxy Statement will be filed with the Securities and Exchange Commission within 120 days of the end of the Company's fiscal year.

OMNICARE, INC.
2004 FORM 10-K ANNUAL REPORT
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As used in this document, unless otherwise specified or the context otherwise requires, the terms "Omnicare," "Company," "its," "we," "our" and "us" refer to Omnicare, Inc. and its consolidated subsidiaries.

PART I

ITEM 1—BUSINESS

Background

Omnicare, Inc. ("Omnicare" or the "Company") is a leading provider of pharmaceutical care for the elderly. Omnicare primarily serves residents in long-term care facilities comprising approximately 1,086,000 beds in 47 states in the United States and in Canada at December 31, 2004, making it the nation's largest provider of professional pharmacy, related pharmacy consulting and other ancillary services, data management services and medical

supplies to skilled nursing, assisted living and other providers of healthcare services. Omnicare also provides clinical research services for the pharmaceutical and biotechnology industries in 30 countries worldwide.

We operate in two business segments. The larger business segment, Pharmacy Services, provides distribution of pharmaceuticals, related pharmacy consulting, data management services and medical supplies to long-term care facilities throughout the United States and in Canada. Pharmacy Services purchases, repackages and dispenses pharmaceuticals, both prescription and non-prescription, and provides computerized medical record-keeping and third-party billing for residents in these facilities. We also provide consultant pharmacist services, including evaluating residents' drug therapy, monitoring the drug distribution system within the nursing facility, assisting in compliance with state and federal regulations and providing proprietary clinical and health management programs. In addition, our Pharmacy Services segment provides ancillary services, such as administering medications and nutrition intravenously and furnishing dialysis and respiratory services, medical supplies and clinical care planning and financial software information systems to our client facilities. Since 1989, we have been involved in a program to acquire providers of pharmaceutical products and related pharmacy management services and medical supplies to long-term care facilities and their residents. Additional information regarding acquisitions is presented at Note 2 (Acquisitions) of the Notes to our 2004 Consolidated Financial Statements, included at Item 8 of this Filing. We also provide pharmaceutical case management services for retirees, employees and dependents who have drug

benefits under corporate-sponsored healthcare programs. In addition, we provide operational software and support systems to long-term care pharmacy providers across the United States. The Pharmacy Services segment has no operating locations outside of the United States of America ("United States") and Canada.

Our other business segment is contract research organization services ("CRO Services"). CRO Services is a leading international provider of comprehensive product development and research services to client companies in the pharmaceutical, biotechnology, medical device and diagnostics industries. Our CRO Services segment provides support for the design of regulatory strategy and clinical development of pharmaceuticals by offering comprehensive and fully integrated clinical, quality assurance, data management, medical writing and regulatory support for our client's drug development programs. As of December 31, 2004, our CRO Services segment operated in 30 countries around the world.

Financial information regarding our business segments is presented at Note 15 (Segment Information) of the Notes to our 2004 Consolidated Financial Statements, included at Item 8 of this Filing.

Pharmacy Services

We purchase, repackage and dispense prescription and non-prescription medication in accordance with physician orders and deliver such prescriptions to the nursing facility for administration to individual residents by the facility's nursing staff. We typically service nursing homes within a 150-mile radius of our pharmacy locations. We maintain a 24-hour, seven-

day per week, on-call pharmacist service for emergency dispensing and delivery and for consultation with the facility's staff or the resident's attending physician.

Upon receipt of a prescription, the relevant resident information is entered into our computerized dispensing and billing systems. At that time, the dispensing system checks the prescription for any potentially adverse drug interactions, duplicative therapy or resident sensitivity. When required and/or specifically requested by the physician or patient, branded drugs are dispensed and generic drugs are substituted in accordance with applicable state and federal laws as requested by the physician or resident. Subject to physician approval and oversight, and in accordance with our pharmaceutical care guidelines, we also provide for patient-specific therapeutic interchange of more efficacious and/or safer drugs for those presently being prescribed. See "The Omnicare Geriatric Pharmaceutical Care Guidelines(R)" below for further discussion.

We provide a unit-of-use drug distribution system. This means that we purchase, repackage and dispense pharmaceuticals in single doses in tamper-resistant, drug-specific packaging labeled for individual residents. This differs from prescriptions filled by retail pharmacies, which typically are dispensed in vials or other bulk packaging requiring measurement of each dose by or for the patient. We believe the unit-of-use system improves control over drugs in the nursing facility, reduces medication errors and improves resident compliance with drug therapy by increasing the accuracy and timeliness of drug administration.

Integral to our drug distribution system is our computerized medical records and documentation

system. We provide the facility with computerized medication administration records, physician's order sheets and treatment records for each resident. Data extracted from these computerized records is also formulated into monthly management reports on resident care and quality assurance. We believe the computerized documentation system, in combination with the unit-of-use drug delivery system, results in greater efficiency in nursing time, improved control, reduced drug waste in the facility and lower error rates in both dispensing and administration. We believe these benefits improve drug efficacy and result in fewer drug-related hospitalizations, thereby lowering overall healthcare costs.

Consultant Pharmacist Services

Federal and state regulations mandate that long-term care facilities, in addition to providing a source of pharmaceuticals, retain consultant pharmacist services to monitor and report on prescription drug therapy in order to maintain and improve the quality of resident care. The Omnibus Budget Reconciliation Act ("OBRA") implemented in 1990 sought to further upgrade and standardize care by setting forth more stringent standards relating to planning, monitoring and reporting on the progress of prescription drug therapy, as well as overall drug usage. We provide consultant pharmacist services, which help clients comply with the federal and state regulations applicable to nursing homes. The services offered by our consultant pharmacists include:

- monthly drug regimen reviews for each resident in the facility to assess the appropriateness and efficacy of drug therapies, including a review of the resident's current medication usage,

monitoring drug reactions to other drugs or food, monitoring lab results and recommending alternate therapies, dosing adjustments or discontinuing unnecessary drugs;

- participation on the pharmacy and therapeutics, quality assurance and other committees of client facilities, as well as periodic involvement in staff meetings;
- monitoring and monthly reporting on overall drug usage;
- development and maintenance of pharmaceutical policy and procedures manuals; and
- assistance to the nursing facility in complying with state and federal regulations as they pertain to drug use.

We have also developed a proprietary software system for use by our consultant pharmacists. The system, called OSC2OR(R) (Omnicare System of Clinical and Cost Outcomes Retrieval), enables our pharmacists not only to perform their functions more efficiently, but also provides the platform for consistent data retrieval for health and outcomes management.

Additionally, we offer specialized consulting services, which help long-term care facilities enhance care and reduce and contain costs, as well as to comply with state and federal regulations. Under these consulting services, we offer:

- data required for OBRA and other regulatory purposes, including reports on usage of chemical restraints known as

psychotropic drugs, antibiotic usage (infection control) and other drug usage;

- plan of care programs, which assess each patient's state of health upon admission and monitor progress and outcomes using data on drug usage as well as dietary, physical therapy and social service inputs;
- counseling related to appropriate drug usage and implementation of drug protocols;
- on-site educational seminars for the nursing facility staff on topics such as drug information relating to clinical indications, adverse drug reactions, drug protocols and special geriatric considerations in drug therapy and information and training on intravenous drug therapy and updates on OBRA and other regulatory compliance issues; and
- nurse consultant services and consulting for dietary and medical records.

The Omnicare Geriatric Pharmaceutical Care Guidelines(R)

In June 1994, to enhance the pharmaceutical care management services that we offer, Omnicare introduced to our client facilities and their attending physicians the Omnicare Geriatric Pharmaceutical Care Guidelines(R) ("Omnicare Guidelines(R)"). We believe the Omnicare Guidelines(R) is the first drug formulary ranking drugs by disease state according to their clinical effectiveness independent of their cost, specifically designed for the elderly residing in long-term care institutions and the community. The Omnicare Guidelines(R) ranks drugs used for specific

diseases as preferred, acceptable or unacceptable based solely on their disease-specific clinical effectiveness in treating the elderly. The formulary takes into account such factors as pharmacology, safety and toxicity, efficacy, drug administration, quality of life and other considerations specific to the frail elderly population residing in facilities and for those living independently. The clinical evaluations and rankings are developed exclusively for us by the University of the Sciences in Philadelphia (formerly the Philadelphia College of Pharmacy), an academic institution recognized for its expertise in geriatric long-term care. The Omnicare Guidelines(R) is extensively reviewed and updated at least annually by the University of Sciences in Philadelphia, taking into account, among other factors, the latest advances as documented in the medical literature. In addition, the Omnicare Guidelines(R) provides relative cost information comparing the prices of the drugs to patients, their insurers or other payors of the pharmacy bill.

As the Omnicare Guidelines(R) focuses on health benefits, rather than solely on cost, we believe that use of the Omnicare Guidelines(R) assists physicians in making the best clinical choices of drug therapy for the patient in a manner that is cost efficient for the payor of the pharmacy bill. Accordingly, we believe that the development of and compliance with the Omnicare Guidelines(R) is important in lowering costs for SNFs operating under the federal government's Prospective Payment System ("PPS") as well as state Medicaid programs, managed care and other payors, including residents or their families.

Health and Outcomes Management

We have expanded upon the data in the Omnicare Guidelines(R) to develop health and outcomes management programs targeted at major categories of disease commonly found in the elderly, such as congestive heart failure, stroke prevention, Alzheimer's disease, fracture prevention and pain management. These programs seek to identify patients who may be candidates for more clinically efficacious drug therapy and to work with physicians to optimize pharmaceutical care for these geriatric patients. We believe these programs can enhance the quality of care of elderly patients while reducing costs to the healthcare system, which arise from the adverse outcomes of sub-optimal or inappropriate drug therapy.

Outcomes-Based Algorithm Technology

Combining data provided by our proprietary systems, the Omnicare Guidelines(R) and health management programs, our pharmacists seek to determine the best clinical and most cost-effective drug therapies and make recommendations for the most appropriate pharmaceutical treatment.

Since late 1997, we have augmented their efforts with the development of proprietary, computerized, database-driven technology that electronically screens and identifies patients at risk for particular diseases and assists in determining treatment protocols. This system combines pharmaceutical, clinical and care planning data and screens the data utilizing algorithms derived from medical best practice standards, allowing our pharmacists to make recommendations to improve the effectiveness of drug therapy in seniors,

including identifying potentially underdiagnosed and undertreated conditions.

Pharmaceutical Case Management

Combining our clinical resources, including the Omnicare Guidelines(R), health and outcomes management programs and our comprehensive database of medical and pharmacy data, we are providing pharmaceutical case management services to community dwelling retirees, employees and dependents who receive drug benefits under employer-sponsored healthcare programs. Because seniors living independently are often under the care of multiple practitioners with no coordination of prescribing, this population is highly susceptible to drug-related problems. Omnicare Senior Health Outcomes addresses this need through programs designed to reduce unnecessary and inappropriate drug use, to add necessary drug therapy according to current practice standards for certain at-risk groups and to make therapeutic interventions in accordance with the Omnicare Guidelines(R) and health management programs. These services are provided on behalf of large corporate employers sponsoring healthcare benefits, including prescription drug benefits, that seek to protect the safety and quality of healthcare for their retirees, employees and dependents while containing or reducing their costs.

Ancillary Services

We provide the following ancillary products and services:

Infusion Therapy Products and Services. With cost containment pressures in healthcare, SNFs and nursing facilities ("NFs") are increasingly called upon to treat patients requiring a high degree of medical

care and who would otherwise be treated in the more costly hospital environment. We provide intravenous, or infusion, therapy products and services for these client facilities and, to a lesser extent, hospice and home care patients. Infusion therapy consists of the product (a nutrient, antibiotic, chemotherapy or other drugs in solution) and the intravenous administration of the product.

We prepare the product to be administered using proper equipment in an aseptic environment and then deliver the product to the nursing home for administration by the nursing staff. Proper administration of intravenous ("IV") drug therapy requires a highly trained nursing staff. Upon request, our consultant pharmacists and nurse consultants provide an education and certification program on IV therapy to assure proper staff training and compliance with regulatory requirements in client facilities offering an IV therapy program.

By providing an infusion therapy program, we enable our client SNFs and NFs to admit and retain patients who otherwise would need to be cared for in a hospital or another type of acute-care facility. The most common infusion therapies we provide are total parenteral nutrition, which provides nutrients intravenously to patients with chronic digestive or gastro-intestinal problems, antibiotic therapy, chemotherapy, pain management and hydration.

Wholesale Medical Supplies/Medicare Part B Billing. We distribute disposable medical supplies, including urological, ostomy, nutritional support and wound care products and other disposables needed in the nursing home environment. In addition, we bill Medicare directly for certain of these product lines for patients eligible under the Medicare Part B program.

As part of this service, we determine patient eligibility, obtain certifications, order products and maintain inventory at the nursing facility. We also contract to act as billing agent for certain nursing homes that supply these products directly to the patient.

Other Services. We provide clinical care plan and financial information systems to long-term care facilities to assist them in preparing and monitoring plans of care for their residents, as well as in predicting and tracking revenues and costs. We also offer operational software for long-term care pharmacies. We offer respiratory therapy products, durable medical equipment and specialty pharmacy services along with pharmacy benefit management and mail order pharmacy services. We provide comprehensive dialysis services on site in certain client long-term care facilities for residents with kidney failure or end-stage renal disease. Such services eliminate the need for transport of residents to off-site clinics for treatment, reducing trauma for the resident and costs for our client facilities. We recently formed a new pharmaceutical informatics service to capitalize on our unique geriatric pharmaceutical database, by providing a unique new offering of Omnicare's broad-based long-term care data to augment the pharmaceutical industry's ability to monitor performance in the long-term care channel. We continue to review the expansion of these as well as other products and services that may further enhance the Company's ability or that of its clients to provide quality healthcare services for their patients in a cost-effective manner.

Contract Research Organization

Our CRO segment provides comprehensive product development and research services globally to client companies in the pharmaceutical, biotechnology, medical devices and diagnostics industries. CRO Services provides support for the design of regulatory strategy and clinical development (phases I through IV) of pharmaceuticals by offering comprehensive and fully integrated project management, clinical monitoring, quality assurance, data management, statistical analysis medical writing and regulatory support for our clients' drug development programs. As of December 31, 2004, the CRO Services segment operated in 30 countries, including the United States.

We believe that our involvement in the CRO business is a logical adjunct to our core institutional pharmacy business and will serve to leverage our assets and strengths, including our access to a large geriatric population and our ability to appropriately collect data for health and outcomes management. We believe such assets and strengths can be of value in developing new drugs targeted at diseases of the elderly and in meeting the Food and Drug Administration's geriatric dosing and labeling requirements for all prescription drugs provided to the elderly, as well as in documenting health outcomes to payors and plan sponsors in a managed care environment. In December 2004, we expanded our CRO business through the acquisition of Clinimetrics Research Associates, Inc. ("Clinimetrics"). We believe this acquisition will enhance our position in capitalizing on the rapidly growing trend in biotechnology research.

Product and Market Development

Our Pharmacy Services and CRO Services businesses engage in a continuing program for the development of new services and for marketing these services. While new service and new market development are important factors for the growth of these businesses, we do not expect that any new service or marketing efforts, including those in the developmental stage, will require the investment of a significant portion of our assets.

Materials/Supply

We purchase pharmaceuticals through a wholesale distributor with whom we have a prime vendor contract, at prices based primarily upon contracts negotiated by us directly with pharmaceutical manufacturers. We also are a member of industry buying groups, which contract with manufacturers for discounted prices. We have numerous sources of supply available to us and have not experienced any difficulty in obtaining pharmaceuticals or other products and supplies used in the conduct of our business.

Patents, Trademarks, and Licenses

Our business operations are not dependent upon any material patents, trademarks or licenses.

Seasonality

Our business operations are not significantly impacted by seasonality.

Inventories

We seek to maintain adequate on site inventories of pharmaceuticals and supplies to ensure prompt delivery service to our customers. Our primary

wholesale distributor also maintains local warehousing in most major geographic markets in which we operate.

Competition

The long-term care pharmacy business is highly regional or local in nature, and within a given geographic area of operations, highly competitive. We are the nation's largest provider of pharmaceuticals and related pharmacy services to long-term care institutions such as SNFs, NFs, assisted living facilities ("ALFs"), retirement centers and other institutional healthcare facilities. In the geographic regions we serve, we compete with local, regional and other national institutional pharmacies, pharmacies owned by long-term care facilities and numerous retail pharmacies. We compete in these markets on the basis of quality, price, terms, and overall cost-effectiveness, along with the clinical expertise, pharmaceutical technology and professional support we offer.

Our CRO business competes against other full-service CROs and client internal resources. The CRO industry is highly fragmented with a number of full-service CROs and many small, limited-service providers, some of which serve only local markets. Clients choose a CRO based on, among other reasons, reputation, references from existing clients, the client's relationship with the CRO, the CRO's experience with the particular type of project and/or therapeutic area of clinical development, the CRO's ability to add value to the client's development plan, the CRO's financial stability and the CRO's ability to provide the full range of services on a global basis as required by the client. We believe that we compete favorably in these respects.

Backlog

Backlog is not a relevant factor in our Pharmacy Services segment since this segment's products and services are sold promptly on an as ordered basis.

Our CRO Services segment reports backlog based on anticipated net revenue for services or projects, yet to be provided, that have been authorized by the customer through signed contracts, letter agreements and certain verbal commitments. Once work begins on a project, net revenue is recognized as the work is completed. Using this method of reporting backlog, at December 31, 2004, backlog was approximately $276.9 million, as compared with approximately $182.8 million at December 31, 2003. The large increase in backlog is primarily attributable to the late 2004 Clinimetrics acquisition. Backlog may not be a consistent indicator of future results of our CRO Services segment because it can be affected by a number of factors, including the variable size and duration of projects, many of which are performed over several years. Additionally, projects may be delayed or terminated by the customer or indirectly delayed by regulatory authorities. Moreover, the scope of work can be increased or decreased during the course of a project.

Customers

At December 31, 2004, our Pharmacy Services segment served long-term care facilities comprising approximately 1,086,000 beds in 47 states in the United States and in Canada.

Our CRO Services segment operates in 30 countries, including the United States, and serves a broad range of clients, including many of the major multi-national pharmaceutical and biotechnology companies, as well

as smaller companies in the pharmaceutical, biotechnology and medical device industries.

No single customer comprised more than 10% of consolidated revenues in 2004, 2003 or 2002.

Government Regulation

Institutional pharmacies, as well as the long-term care facilities they serve, are subject to extensive federal, state and local regulation. These regulations cover required qualifications, day-to-day operations, reimbursement and the documentation of activities. In addition, our CRO Services are subject to substantial regulation, both domestically and abroad. We continuously monitor the effects of regulatory activity on our operations.

Licensure, Certification and Regulation. States generally require that companies operating a pharmacy within the state be licensed by the state board of pharmacy. At December 31, 2004, we had pharmacy licenses, or pending applications, for each pharmacy we operate. In addition, at December 31, 2004, we delivered prescription products from our licensed pharmacies to two states, in which we do not operate a pharmacy. These states regulate out-of-state pharmacies, however, as a condition to the delivery of prescription products to patients in these states. Our pharmacies hold the requisite licenses applicable in these states. In addition, our pharmacies are registered with the appropriate state and federal authorities pursuant to statutes governing the regulation of controlled substances.

Client long-term care facilities are also separately required to be licensed in the states in which they operate and, if serving Medicaid or Medicare patients, must be certified to be in compliance with applicable

program participation requirements. Client facilities are also subject to the nursing home reforms of the Omnibus Budget Reconciliation Act of 1987 ("OBRA of 1987"), as amended, which imposed strict compliance standards relating to quality of care for nursing home operations, including vastly increased documentation and reporting requirements. In addition, pharmacists, nurses and other healthcare professionals who provide services on our behalf are in most cases required to obtain and maintain professional licenses and are subject to state regulation regarding professional standards of conduct.

Federal and State Laws Affecting the Repackaging, Labeling and Interstate Shipping of Drugs. Federal and state laws impose certain repackaging, labeling and package insert requirements on pharmacies that repackage drugs for distribution beyond the regular practice of dispensing or selling drugs directly to patients at retail outlets. A drug repackager must register with the Food and Drug Administration ("FDA") as a manufacturing establishment, and is subject to FDA inspection for compliance with relevant good manufacturing practices ("GMP"). We hold all required registrations and licenses, and we believe our repackaging operations are in compliance with applicable federal and state GMP requirements. In addition, we believe we comply with all relevant requirements of the Prescription Drug Marketing Act for the transfer and shipment of pharmaceuticals.

State Laws Affecting Access to Services. Some states have enacted "freedom of choice" or "any willing provider" requirements as part of their state Medicaid programs or in separate legislation. These laws may preclude a nursing facility from requiring their patients to purchase pharmacy or other ancillary

medical services or supplies from particular providers that deal with the nursing home. Limitations such as these may increase the competition which we face in providing services to nursing facility residents.

Medicare and Medicaid. The nursing home pharmacy business has long operated under regulatory and cost containment pressures from state and federal legislation primarily affecting Medicaid and, to a lesser extent, Medicare.

As is the case for nursing home services generally, we receive reimbursement from the Medicaid and Medicare programs, directly from individual residents or their responsible parties (private pay), long-term care facilities and from other payors such as third-party insurers. The table below represents our approximated payor mix for the last three years:

	2004	2003	2002
State Medicaid programs	48%	47%	46%
Private pay and long-term care facilities (a)	45%	45%	44%
Federal Medicare programs (b)	2%	2%	2%
Other private sources (c)	5%	6%	8%
Totals	100%	100%	100%

(a) Includes payments from skilled nursing facilities on behalf of their federal Medicare program-eligible residents (Medicare Part A) and for other services and supplies, as well as payments from third-party insurers and private pay.

(b) Includes direct billing for medical supplies.

(c) Includes our CRO revenues.

For those patients who are not covered by government-sponsored programs or private insurance, we

generally directly bill the patient or the patient's responsible party on a monthly basis. Depending upon local market practices, we may alternatively bill private patients through the nursing facility. Pricing for private pay patients is based on prevailing regional market rates or "usual and customary" charges.

The Medicaid program is a cooperative federal-state program designed to enable states to provide medical assistance to aged, blind or disabled individuals or members of families with dependent children whose income and resources are insufficient to meet the costs of necessary medical services. State participation in the Medicaid program is voluntary. To become eligible to receive federal funds, a state must submit a Medicaid "state plan" to the Secretary of the Department of Health and Human Services ("HHS") for approval. The federal Medicaid statute specifies a variety of requirements which the state plan must meet, including requirements relating to eligibility, coverage of services, payment and administration. We have provider agreements to participate in state Medicaid programs.

Federal law and regulations contain a variety of requirements relating to the furnishing of prescription drugs under Medicaid. First, states are given authority, subject to certain standards, to limit or specify conditions for the coverage of particular drugs. Second, federal Medicaid law establishes standards affecting pharmacy practice. These standards include general requirements relating to patient counseling and drug utilization review and more specific standards for SNFs and NFs relating to drug regimen reviews for Medicaid patients in such facilities. Regulations clarify that, under federal law, a pharmacy is not required to meet the general requirements

for drugs dispensed to nursing facility residents if the nursing facility complies with the drug regimen review standards. However, the regulations indicate that states may nevertheless require pharmacies to comply with the general requirements, regardless of whether the nursing facility satisfies the drug regimen review requirement, and the states in which we operate currently do require our pharmacies to comply with these general standards. Third, federal regulations impose certain requirements relating to reimbursement for prescription drugs furnished to Medicaid patients.

Among other things, regulations establish "upper limits" on payment levels. In addition to requirements imposed by federal law, states have substantial discretion to determine administrative, coverage, eligibility and payment policies under their state Medicaid programs that may affect our operations.

The Medicare program is a federally funded and administered health insurance program for individuals age 65 and over, or who are disabled. The Medicare program currently consists of three parts: Medicare Part A, which covers, among other things, inpatient hospital, skilled nursing facility, home healthcare and certain other types of healthcare services; Medicare Part B, which covers physicians' services, outpatient services, items and services provided by medical suppliers, and a limited number of specifically designated prescription drugs; and Medicare Part C, established by the Balanced Budget Act of 1997 ("BBA"), which generally allows beneficiaries to enroll in additional types of managed care programs beyond the traditional Medicare fee for service program. Part C has generally been referred to as "Medicare+Choice" and is now known as

"Medicare Advantage." Many Medicare beneficiaries are being served through such Medicare Advantage organizations. In addition to the limited Medicare coverage for specified products described above, some of these payor organizations providing healthcare benefits to Medicare beneficiaries offer expanded drug coverage. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA"), enacted in December 2003, established a Medicare Part D, which will provide a new prescription drug benefit starting January 1, 2006 (discussed below).

The Medicare program establishes requirements for participation of providers and suppliers in the Medicare program. Pharmacies are not subject to such certification requirements. SNFs and suppliers of medical equipment and supplies, however, including our supplier operations, are subject to specified standards. Failure to comply with these requirements and standards may adversely affect an entity's ability to participate in the Medicare program and receive reimbursement for services provided to Medicare beneficiaries.

Medicare and Medicaid providers and suppliers are subject to inquiries or audits to evaluate their compliance with requirements and standards set forth under these government-sponsored programs. These audits and inquiries, as well as our own internal compliance program, from time to time have identified overpayment and other billing errors resulting in repayment or self-reporting. We believe that our billing practices materially comply with applicable state and federal requirements. However, the requirements may be interpreted in the future in a manner inconsistent with our interpretation and application.

The Medicare and Medicaid programs are subject to statutory and regulatory changes, retroactive and prospective rate adjustments, administrative rulings, executive orders and freezes and funding reductions, all of which may adversely affect our business. Payments for pharmaceutical supplies and services under the Medicare and Medicaid programs may not continue to be based on current methodologies or remain comparable to present levels. In this regard, we may be subject to rate reductions as a result of federal budgetary or other legislation related to the Medicare and Medicaid programs. In addition, various state Medicaid programs periodically experience budgetary shortfalls which may result in Medicaid payment reductions and delays in payment to us.

In addition, the failure, even if inadvertent, of our and/or our client institutions to comply with applicable reimbursement regulations could adversely affect our business. Additionally, changes in reimbursement programs or in regulations related thereto, such as reductions in the allowable reimbursement levels, modifications in the timing or processing of payments and other changes intended to limit or decrease the growth of Medicaid and Medicare expenditures, could adversely affect our business.

Referral Restrictions. We have to comply with federal and state laws which govern financial and other arrangements between healthcare providers. These laws include the federal anti-kickback statute, which prohibits, among other things, knowingly and willfully soliciting, receiving, offering or paying any remuneration directly or indirectly in return for or to induce the referral of an individual to a person for the furnishing of any item or service for which payment may be made in whole or in part under federal

healthcare programs. We are also subject to the federal physician self-referral statute, which prohibits physicians from referring Medicare and Medicaid patients for certain "designated health services," including outpatient prescription drugs, durable medical equipment, and enteral supplies and equipment to an entity if the referring physician (or a member of the physician's immediate family) has a "financial relationship," through ownership or compensation with the entity. Many states have enacted similar statutes which are not necessarily limited to items and services for which payment is made by federal healthcare programs. Violations of these laws may result in fines, imprisonment, denial of payment for services, and exclusion from the federal programs and/or other state-funded programs.

Other provisions in the Social Security Act and in other federal and state laws authorize the imposition of penalties, including criminal and civil fines and exclusions from participation in Medicare, Medicaid and other federal healthcare programs for false claims, improper billing and other offenses.

In addition, a number of states have undertaken enforcement actions against pharmaceutical manufacturers involving pharmaceutical marketing programs, including programs containing incentives to pharmacists to dispense one particular product rather than another. These enforcement actions arose under state consumer protection laws which generally prohibit false advertising, deceptive trade practices, and the like.

We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws. These laws may,

however, be interpreted in the future in a manner inconsistent with our interpretation and application.

Healthcare Reform and Federal Budget Legislation. In recent years, federal legislation has resulted in major changes in the healthcare system, which significantly affected healthcare providers, either nationally or at the state level. The BBA sought to achieve a balanced federal budget by, among other things, reducing federal spending on the Medicare and Medicaid programs. With respect to Medicare, the law mandated establishment of a PPS for SNFs under which facilities are paid a federal per diem rate for virtually all covered SNF services, including ancillary services such as pharmacy. Payment is determined by one of 44 resource utilization group ("RUG") categories.

PPS was implemented for cost reporting periods beginning on or after July 1, 1998. The BBA also imposed numerous other cost-saving measures affecting Medicare SNF services.

In 1999 and 2000, Congress passed legislation to mitigate the impact of the reimbursement cuts resulting from the BBA. We believe this legislation improved the financial condition of SNFs and provided incentives to increase occupancy and Medicare admissions, particularly among the more acutely ill. While certain of the payment increases mandated by these laws expired October 1, 2002, SNFs continue to benefit from temporary rate increases for certain high-acuity patients, including medically-complex patients with generally higher pharmacy costs, pending revisions to the RUG categories. The increases will continue until the Centers for Medicare & Medicaid Services ("CMS") implements a refined RUG system that better accounts for medically-complex patients.

The Secretary of HHS did not implement such refinements in fiscal years 2003, 2004 or 2005. President Bush's proposed fiscal year 2006 budget indicates that CMS intends to implement the refinements in fiscal year 2006, resulting in $1.5 billion in decreased expenditures in 2006. However, it is unclear at this time whether CMS will implement RUG refinement as described in the President's budget proposal.

As noted, certain payment increases in Medicare reimbursement for SNFs expired on October 1, 2002. The impact of these expirations on its customers has not resulted in a significant impact on Omnicare. Moreover, SNF PPS rates for fiscal years 2004 and 2005 increased 3.0% and 2.8%, respectively. In addition, rates for fiscal year 2004 were increased by an additional 3.26% to reflect cumulative forecast errors since the start of the SNF PPS on July 1, 1998. CMS estimates that these adjustments resulted in an estimated $850 million increase in Medicare payments to SNFs in fiscal year 2004. The fiscal year 2005 payment increase will result in an estimated $440 million increase in Medicare payments to SNFs and the continuation of the high-acuity patient add-on will result in an estimated additional $1 billion in payments for the same period. Nonetheless, the loss of revenues associated with future changes in SNF payment rates could, in the future, have an adverse effect on the financial condition of our SNF clients which could, in turn, adversely affect the timing or level of their payments to Omnicare.

The MMA includes a major expansion of the Medicare prescription drug benefit under a new Medicare Part D, which goes into effect on January 1, 2006. Until the Part D benefit goes into effect,

Medicare beneficiaries are able to receive assistance with their outpatient prescription drug costs through a new prescription drug discount card program, which began in June 2004, and which gives enrollees access to negotiated discounted prices for prescription drugs. PBM-Plus, Inc., an Omnicare subsidiary, was selected by CMS as an endorsed sponsor to offer a Medicare prescription drug discount card. PBM-Plus also received a special endorsement for long-term care to administer a transitional assistance benefit of $600 per year to certain qualified low-income eligible seniors not currently receiving drug benefits from the Medicare and Medicaid programs. In addition, the Long Term Care Pharmacy Alliance, LLC ("LTCPA") (of which we are a member, together with several other national institutional pharmacies) has also received the special long-term care endorsement from CMS to administer the transitional assistance benefit.

Under the new prescription drug benefit, Medicare beneficiaries will be able to enroll in prescription drug plans offered by private entities (or in a "fallback" plan offered on behalf of the government through a contractor, to the extent private entities fail to offer a plan in a given area), which will provide coverage for prescription drugs (collectively, "Part D Plans"). Part D Plans will include both plans providing the drug benefit on a stand alone basis ("PDPs"), and Medicare Advantage plans providing drug coverage as a supplement to an existing medical benefit under that Medicare Advantage plan (an "MA-PD"), most commonly a health maintenance organization plan. Medicare beneficiaries generally will have to pay a premium to enroll in a Part D Plan, with the premium amount varying from plan to plan, although CMS will provide various federal subsidies to Part D Plans to reduce the cost to beneficiaries.

On January 28, 2005, CMS published the final rule to implement the Medicare Part D drug benefit. Under these regulations, Medicare beneficiaries who are also entitled to benefits under a state Medicaid program (so-called "dual eligibles") will have their outpatient prescription drug costs covered by the new Medicare drug benefit, subject to certain limitations. Most of the nursing home residents we serve, whose drug costs are currently covered by state Medicaid programs, are dual-eligibles who will be moved to the new Medicare drug benefit. Pursuant to the MMA, CMS will provide premium and cost-sharing subsidies to Part D Plans with respect to dual eligible residents of nursing homes. As a consequence, such dual eligibles will not be required to pay a premium for enrollment in a Part D Plan, so long as the premium for the Part D Plan in which they are enrolled is at or below the premium subsidy. Dual eligible residents of nursing homes will be entitled to have all of their prescription drug costs covered by a Part D Plan, provided that the prescription drugs which they are taking are either on the Part D Plan's formulary, or an exception to the plan's formulary is granted. CMS will review the formularies of Part D Plans and has indicated that it will require their formularies to include the types of drugs most commonly needed by Medicare beneficiaries, and that plans' formulary exceptions criteria provide for coverage of drugs determined by the plan to be medically appropriate for the enrollee. The MMA also makes available partial premium and cost-sharing subsidies for certain other classes of low-income enrollees who do not qualify for Medicaid.

Pursuant to the final rule, we will obtain reimbursement for drugs we provide to enrollees of a given Part D Plan in accordance with the terms of

agreements negotiated between us and that Part D Plan. We intend to negotiate such agreements with Part D Plans under which we would provide drugs and associated services to their enrollees. Until such agreements are negotiated, we will not be able to determine what changes, if any, there may be to the terms and conditions under which we provide drugs and services to Medicare beneficiaries who become enrollees of Part D Plans.

CMS will be issuing subregulatory guidance on many aspects of the final rule throughout 2005 as the new program is implemented. Additionally, the Secretary of HHS is required to conduct a study of current standards of practice for pharmacy services provided to patients in long-term care settings, and among other things, make recommendations regarding necessary actions and appropriate reimbursement to ensure the provision of prescription drugs to Medicare beneficiaries in nursing facilities is consistent with existing patient safety and quality of care standards. The results of this study are due to be reported to Congress by June 2005. We are continuing to review the final Part D regulations and relevant subregulatory guidance and cannot predict the ultimate effect of the final rule or the outcome of other potential developments relating to its implementation on our business or results of operations.

The MMA does not alter the federal reimbursement scheme for residents of SNFs whose stay at the facility is covered under Medicare Part A's PPS. Accordingly, Medicare's fixed per diem payments to SNFs under PPS continue to include a portion attributable to the expected cost of drugs provided to such residents, and we will continue to receive reimbursement for drugs provided to such residents from the SNFs, in

accordance with the terms of the agreements we have negotiated with each SNF.

The MMA also reforms the Medicare Part B prescription drug payment methodology. With certain exceptions, in 2004 most Part B drugs were reimbursed at 85 percent of the April 1, 2003 average wholesale price. In 2005, Medicare Part B payment generally equals 106 percent of the lesser of (i) the wholesale acquisition cost of the product, or (ii) the average sales price ("ASP") of the product, with certain exceptions and adjustments. More significant reforms are planned for 2006, when most drugs will be reimbursed under either an ASP methodology or under a "competitive acquisition program." The Company's revenues for drugs dispensed under Medicare Part B are not significant in comparison to total revenues. The MMA also includes provisions that will institute administrative reforms designed to improve Medicare program operations. It is uncertain at this time the impact that the MMA's legislative reforms or future Medicare reform legislation ultimately will have on us.

Discounted average wholesale price ("AWP") plus a dispensing fee is the basis for many state Medicaid programs' reimbursement of drugs to pharmacy providers for Medicaid beneficiaries generally as well as under certain private reimbursement programs. If government or private health insurance programs discontinue or modify the use of AWP or otherwise implement payment methods that reduce the reimbursement for drugs and biologicals, it could adversely affect the Company's level of reimbursement.

With respect to Medicaid, the BBA repealed the "Boren Amendment" federal payment standard for

Medicaid payments to Medicaid NFs effective October 1, 1997, giving states greater latitude in setting payment rates for such facilities. The law also granted states greater flexibility to establish Medicaid managed care programs without the need to obtain a federal waiver. Although these waiver programs generally exempt institutional care, including NFs and institutional pharmacy services, some states do use managed care principles in their long-term care programs. Moreover, no assurances can be given that additional Medicaid programs ultimately will not change the reimbursement system for long-term care, including pharmacy services, from fee-for-service to managed care negotiated or capitated rates. Our operations have not been adversely affected in states with managed care programs in effect. In addition, some states, continue to face budget shortfalls, and most states are taking steps to implement cost controls within their Medicaid programs. Likewise, the federal government may consider changes to Medicaid designed to rein in program spending. There can be no assurance that future changes in Medicaid payments to pharmacies, NFs or managed care systems will not have an adverse impact on our business.

Contract Research Organization Services. The clinical services performed by our CRO Services are subject to various regulatory requirements designed to ensure the quality and integrity of the data produced as a result of these services.

The industry standard for conducting clinical testing is embodied in the good clinical practice ("GCP") and Investigational New Drugs ("IND") regulations administered by the FDA. Research conducted at institutions supported by funds from the National Institutes of Health ("NIH") must also

comply with multiple project assurance agreements and guidelines administered by NIH and the HHS Office of Research Protection. The requirements for facilities engaging in pharmaceutical, clinical trial, supply preparation, labeling and distribution are set forth in the good manufacturing practices ("GMP") regulations and in GCP guidelines. The United States and European Union ("EU") also recognize the Guidelines for Good Clinical Practice adopted by the International Conference on Harmonisation ("ICH"). GCP, IND and GMP regulations, and ICH guidelines, have been mandated by the FDA and the European Medicines Evaluation Agency (the "EMEA") and have been adopted by similar regulatory authorities in other countries. GCP, IND and GMP regulations, and ICH guidelines, stipulate requirements for facilities, equipment, supplies and personnel engaged in the conduct of studies to which these regulations apply. The regulations require that written, standard operating procedures ("SOPs") are followed during the conduct of studies and for the recording, reporting and retention of study data and records. To help assure compliance, our CRO Services has a worldwide staff of experienced quality assurance professionals who monitor ongoing compliance with these regulations and guidelines by auditing study data and conducting regular inspections of testing procedures and facilities. The FDA and other regulatory authorities require that study results and data submitted to such authorities are based on studies conducted in accordance with GCP and IND provisions. These provisions include:

- complying with specific regulations governing the selection of qualified investigators;

- obtaining specific written commitments from the investigators;
- disclosure of financial conflicts of interest;
- verifying that patient informed consent is obtained;
- instructing investigators to maintain records and reports;
- verifying drug or device accountability; and
- permitting appropriate governmental authorities access to data and study sites for their review and inspection.

Records for clinical studies must be maintained for specific periods for inspection by the FDA, EU or other authorities during audits. Non-compliance with GCP or IND requirements can result in the disqualification of data collected during the clinical trial and may lead to debarment of an investigator or CRO if fraud is detected.

CRO Services' SOPs related to clinical studies are written in accordance with regulations and guidelines appropriate to a global standard with regional variations in the regions where they will be used, thus helping to ensure compliance with GCP. CRO Services also generally complies with a reasonable interpretation of the ICH Guideline for Good Clinical Practice, EU GCP regulations and U.S. GCP regulations for North America. In addition, we believe that our CRO Services are in compliance with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and our CRO Services employees have been trained to comply with this legislation.

Although we believe that we are in compliance in all material respects with federal, state and local laws,

failure to comply could subject us to denial of the right to conduct business, fines, criminal penalties and other enforcement actions.

Health Information Practices. The Company, along with the healthcare industry in general, is impacted by HIPAA, which mandates, among other things, the adoption of standards for the exchange of electronic health information in an effort to enhance the efficiency and simplify the administration of the healthcare system. In addition, HIPAA requires HHS to adopt standards for electronic transactions and code sets; unique identifiers for providers, employers, health plans and individuals; security and electronic signatures; privacy; and enforcement. While HIPAA ultimately is designed to reduce administrative expenses within the healthcare system, the law has resulted in some costly changes for the industry. Compliance with the Electronic Healthcare Transactions and Code Sets was required in 2003. On February 27, 2004, CMS instructed Medicare carriers and fiscal intermediaries that, as of July 6, 2004, HIPAA non-compliant claims may be paid no earlier than 27 days after receipt, while HIPAA compliant claims are eligible for payment 14 days from receipt. The Company is fully compliant with all HIPAA-related electronic transactions, and is not experiencing any HIPAA-related claims processing problems. Most health plans and healthcare providers such as the Company were required to comply with the HIPAA privacy standards by April 14, 2003. The Company adheres to the relevant organizational structure provisions of HIPAA's privacy regulation in order that the Company's business units and divisions may permissibly use and disclose protected health information with each other. Omnicare's Employee Retirement Income Security Act health benefit plans

are HIPAA covered entities. As required by the statute, Omnicare has appointed privacy and security officers. The privacy regulations require healthcare providers like Omnicare, to provide a notice describing patient's privacy rights and our privacy practices to all of the patients to whom we provide healthcare products or services. In addition to HIPAA, the Company works to ensure that it adheres to state privacy laws and other state privacy requirements not preempted by HIPAA, including those which furnish greater privacy protection for the individual than HIPAA. In February 2003, HHS published standards for the security of electronic health information. The Company is prepared to comply with the requirements of the security standards no later than April 20, 2005. In addition, in January 2004, CMS published a rule announcing the adoption of the National Provider Identifier as the standard unique health identifier for healthcare providers to use in filing and processing healthcare claims and other transactions. The Company is prepared to make application for these identifiers in accordance with the rule which is effective May 23, 2005, with a compliance date of May 23, 2007.

Although we believe our contract arrangements with healthcare payors and providers and our business practices are materially in compliance with applicable federal and state electronic transmission, privacy and security laws, failure to comply could subject us to denial of the right to conduct business, fines, criminal penalties and other enforcement actions.

Compliance Program. The Office of Inspector General ("OIG") has issued guidance to various sectors of the healthcare industry to help providers design

effective voluntary compliance programs to prevent fraud, waste and abuse in healthcare programs, including Medicare and Medicaid. In addition, the Company and its operating units are subject in the ordinary course of business to audit, compliance, administrative and investigatory reviews by federal and state authorities covering various aspects of its business. In 1998, Omnicare voluntarily adopted a compliance program to assist us in complying with applicable government regulations, and the Company continues to maintain and support its compliance program.

Environmental Matters

In operating our facilities, historically we have not encountered any major difficulties in effecting compliance with applicable pollution control laws. No material capital expenditures for environmental control facilities are expected. While we cannot predict the effect which any future legislation, regulations or interpretations may have upon our operations, we do not anticipate any changes that would have a material adverse impact to Omnicare.

Employees

At December 31, 2004, we employed approximately 12,900 persons (including approximately 4,000 part-time employees), of which approximately 12,400 are located within, and approximately 500 outside of, the United States.

Available Information

We make available free of charge on or through our Corporate Web site, at www.omnicare.com, our annual reports on Form 10-K, quarterly reports on Form 10-

Q, current reports on Form 8-K and all amendments to those reports as soon as reasonably practicable after such material is electronically filed with the Securities and Exchange Commission ("SEC"). Additionally, the public may read and copy any materials we file with the SEC at the SEC's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C., 20549. Information regarding operation of the Public Reference Room is available by calling the SEC at 1-800-SEC-0330. Information that we file with the SEC is also available at the SEC's Web site at www.sec.gov.

We also post on our corporate website the following corporate governance documents and committee charters:

- Corporate Governance Guidelines
- Code of Business Conduct and Ethics
- Code of Ethics for CEO and Senior Financial Officers
- Audit Committee Charter
- Compensation and Incentive Committee Charter
- Executive Committee Charter
- Nominating and Governance Committee Charter

Copies of these documents are also available in print to any stockholder who requests them by writing our Corporate Secretary at:

Omnicare, Inc.
1600 RiverCenter II
100 East RiverCenter Boulevard
Covington, Kentucky 41011

ITEM 2—PROPERTIES

We have offices, distribution centers and other key operating facilities in various locations in and outside the United States. As of December 31, 2004, we operated a total of 224 facilities, five of which we owned. A list of the 66 more significant facilities, defined as having at least 15,000 square feet ("sq. ft."), we operated as of December 31, 2004 follows, grouped by reporting segment and summarized by geographic location. The owned properties are held in fee and are not subject to any material encumbrance. We consider all of these facilities to be in good operating condition and generally to be adequate for present and anticipated needs.

		Owned Area	Leased Area	
Location	Type	(sq. ft.)	(sq. ft.)	Expiration Date
Pharmacy Services:				
Livonia, Michigan	Offices and Distribution Center	—	50,438	May 31, 2007
Des Plaines, Illinois	Offices and Distribution Center	—	47,971	May 31, 2008
Perrysburg, Ohio	Offices and Distribution Center	44,000	—	—
Indianapolis, Indiana	Warehouse	—	42,651	March 30, 2007
Milwaukee, Wisconsin	Offices and Distribution Center	—	41,816	March 31, 2009

effective drug therapies due to rising research costs. However, they are significantly more effective in curing or ameliorating illness and in lowering overall healthcare costs by reducing, among other things, hospitalizations, physician visits, nursing time and lab tests. These trends not only support long-term growth for the geriatric pharmaceutical industry but also containment of healthcare costs and the well-being of the nation's growing elderly population.

In order to fund this growing demand, the Company anticipates that the government and the private sector will continue to review, assess and possibly alter healthcare delivery systems and payment methodologies. While it is not possible to predict the effect of the new Medicare Part D drug benefit or any further initiatives on Omnicare's business, management believes that the Company's expertise in geriatric pharmaceutical care and pharmaceutical cost management position Omnicare to help meet the challenges of today's healthcare environment. Further, while volatility can occur from time to time in the contract research business owing to factors such as the success or failure of its clients' compounds, the timing or budgetary constraints of its clients, or consolidation within our client base, new drug discovery remains an important priority of drug manufacturers. Drug manufacturers, in order to optimize their research and development efforts, will continue to turn to contract research organizations to assist them in accelerating drug research development and commercialization.

Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995 Regarding Forward-Looking Information

In addition to historical information, this report contains certain statements that constitute "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. These forward-looking statements are made on the basis of management's views and assumptions regarding business performance as of the time the statements are made, and management does not undertake any obligation to update these statements. These forward-looking statements include, but are not limited to, all statements regarding the intent, belief or current expectations regarding the matters discussed or incorporated by reference in this document (including statements as to "beliefs," "expectations," "anticipations," "intentions" or similar words) and all statements which are not statements of historical fact.

Forward-looking statements in this report include, but are not limited to, the following: expectations concerning the Company's financial performance, results of operations, sales, earnings or business outlook; trends in the long-term healthcare and contract research industries generally; expectations concerning the Company's ability to leverage its core business; anticipated growth in alternative institutional markets such as correctional facilities, hospice care, mental health and personal care or supportive living facilities; expectations concerning continued relative stability in the operating environment in the long-term care industry; anticipated demographic trends in the healthcare industry; the impact of drug price inflation; changes in government and other reimbursement formulas to take into account drug

price inflation or deflation; the ability to allocate resources in order to enhance gross profit margins; the ability to continue the Company's value creation strategy through expanding its core pharmaceutical business and leveraging that business through the development and expansion of clinical information services; the Company's ability to continue to leverage fixed and variable overhead costs through internal and acquired growth; the impact of the 2003 refinancing in enhancing the Company's financial position and providing financial flexibility to support its ongoing growth strategies; other factors affecting the Company's strategy for future growth; the effectiveness of the Company's unit-of-use controls and computerized documentation system; the effectiveness of the Company's health and outcomes management programs; the ability to leverage the Company's CRO business and its core pharmacy business as anticipated; expectations concerning product and market development efforts; trends concerning the commencement, continuation or cancellation of CRO projects and backlog; the effectiveness of recent cost reduction efforts in the CRO; volatility in the CRO business; anticipated business performance of the CRO in 2005; expectations in the CRO business resulting from streamlining and globalization efforts, the Company's unique capabilities in the geriatric market and strength of presence in the drug development marketplace; trends in healthcare funding issues, including, but not limited to, state Medicaid budgets, enrollee eligibility, escalating drug prices due to higher utilization among seniors and the aging of the population; expectations concerning increasing Medicare admissions and improving occupancy rates; the introduction of more expensive medications, and increasing use of generic

medications; the impact of any changes in healthcare policy relating to the future funding of the Medicaid and Medicare programs; the cost-effectiveness of pharmaceuticals in treating chronic illnesses for the elderly; the effectiveness of the Company's formulary compliance program; the effectiveness of the Company's pharmaceutical purchasing programs and its ability to obtain discounts and manage pharmaceutical costs; the adequacy and availability of the Company's sources of liquidity and capital; payments of future quarterly dividends; the adequacy of the Company's net cash flows from operating activities, credit facilities and other long- and short-term debt financings to satisfy the Company's future working capital needs, acquisition contingency commitments, debt servicing, capital expenditures and other financing requirements for the foreseeable future; the ability, if necessary, to refinance indebtedness or issue additional indebtedness or equity; interest rate risk on the Company's outstanding debt; valuations of derivative instruments embedded in the Old Trust PIERS and New Trust PIERS instruments; the adequacy of the Company's allowance for doubtful accounts; expectations concerning inventory write-offs; the adequacy of insurance expense estimates and methodology; the adequacy of the provisions for current or deferred taxes; the impact of reduced government reimbursement rates to the Company's SNF clients which could adversely affect the timing or level of SNF payments to the Company; the impact of the MMA, including the Medicare Part D prescription drug benefit, effective January 1, 2006, as implemented pursuant to CMS regulations and subregulatory guidance; the impact of continued pressure on federal and state Medicaid budgets and budget shortfalls which have led to decreasing

reimbursement rates and other cost control measures in certain states; the Company's ability to respond to such federal and state budget shortfalls and corresponding reductions in Medicaid reimbursement rates; the effect of any changes and considerations in long-term healthcare funding policies for Medicare and Medicaid programs; expected demand for long-term care; the pace and quality of new drug development targeted at diseases of the elderly; the impact of newer drugs that, although more expensive, are more efficient at treating illness and thereby reduce overall healthcare costs; trends and expectations concerning long-term growth prospects for the geriatric care industry and the containment of healthcare costs for the elderly; expectations concerning the growth in the elderly population; anticipated changes in healthcare delivery systems and payment methodologies in order to fund growing demand; the ability of the Company to utilize its expertise in geriatric pharmaceutical care and pharmaceutical cost management and its database on drug utilization and outcomes in the elderly to meet the anticipated challenges of the healthcare environment; the effectiveness of the Company's growth strategy in allowing the Company to maximize cash flow, maintain a strong financial position, enhance the efficiency of its operations and continue to develop the Company's franchise in the geriatric pharmaceutical market; the ability of expansion in the Company's core business to provide the Company greater ability to leverage its clinical services and information business, thereby enhancing cost advantages in the institutional pharmacy market; the belief that new drug discovery will remain an important priority for pharmaceutical manufacturers; and expectations concerning opportunities for future

growth and the continued need for pharmaceutical manufacturers to utilize contract research businesses in optimizing research and development efforts.

These forward-looking statements, together with other statements that are not historical, involve known and unknown risks, uncertainties, contingencies and other factors that could cause actual results, performance or achievements to differ materially from those stated. Such risks, uncertainties, contingencies and other factors, many of which are beyond the control of the Company, include, but are not limited to: overall economic, financial, political and business conditions; trends in the long-term healthcare and contract research industries; competition in the pharmaceutical, long-term care and contract research industries; the impact of consolidation in the pharmaceutical and long-term care industries; trends in long-term care occupancy rates and demographics; the ability to attract new clients and service contracts and retain existing clients and service contracts; trends for the continued growth of the Company's businesses; expectations concerning the development and performance of the Company's informatics business; the effectiveness of the Company's formulary compliance program; trends in drug pricing, including the impact and pace of pharmaceutical price increases; delays and reductions in reimbursement by the government and other payors to customers and to the Company as a result of pressures on federal and state budgets or for other reasons; the overall financial condition of the Company's customers; the ability of the Company to assess and react to the financial condition of its customers; the effectiveness of the Company's pharmaceutical purchasing programs and its ability to obtain discounts and manage pharmaceutical costs; the ability of vendors and business partners to

continue to provide products and services to the Company; the continued successful integration of acquired companies and the ability to realize anticipated revenues, economies of scale, cost synergies and profitability; the continued availability of suitable acquisition candidates; pricing and other competitive factors in the industry; increases or decreases in reimbursement rates and the impact of other cost control measures; the impact on the Company's revenues, profits and margins resulting from market trends in the use of newer branded drugs versus generic drugs; the number and usage of generic drugs and price competition in the drug marketplace; the ability to attract and retain needed management; competition for qualified staff in the healthcare industry; the impact and pace of technological advances; the ability to obtain or maintain rights to data, technology and other intellectual property; the demand for the Company's products and services; variations in costs or expenses; the ability to implement productivity, consolidation and cost reduction efforts and to realize anticipated benefits; the ability of clinical research projects to produce revenues in future periods; the ability to benefit from streamlining and globalization efforts at the CRO; trends concerning CRO backlog; the effectiveness of the Company's implementation and expansion of its clinical and other service programs; the effect of new legislation, government regulations, and/or executive orders, including those relating to reimbursement and drug pricing policies and changes in the interpretation and application of such policies; the impact of the MMA, including the Medicare Part D prescription drug benefit effective January 1, 2006, as implemented pursuant to CMS regulations and subregulatory guidance; legislation and regulations affecting

payment and reimbursement rates for SNFs; trends in federal and state budgets and their impact on Medicaid reimbursement rates; government budgetary pressures and shifting priorities; the Company's ability to adjust to federal and state budget shortfalls; efforts by payors to control costs; the failure of the Company or the long-term care facilities it serves to obtain or maintain required regulatory approvals or licenses; loss or delay of contracts pertaining to the Company's CRO business for regulatory or other reasons; the outcome of litigation; potential liability for losses not covered by, or in excess of, insurance; the impact of differences in actuarial assumptions and estimates pertaining to employee benefit plans; events or circumstances which result in an impairment of goodwill; market conditions which adversely affect the valuation of the Old Trust PIERS and the New Trust PIERS; the outcome of audit, compliance, administrative or investigatory reviews; volatility in the market for the Company's stock and in the financial markets generally; access to adequate capital and financing; changes in international economic and political conditions and currency fluctuations between the U.S. dollar and other currencies; changes in tax laws and regulations; changes in accounting rules and standards; and other risks and uncertainties described in Company reports and filings with the Securities and Exchange Commission.

Should one or more of these risks or uncertainties materialize or should underlying assumptions prove incorrect, the Company's actual results, performance or achievements could differ materially from those expressed in, or implied by, such forward-looking statements. Readers are cautioned not to place undue reliance on these forward-looking statements, which speak only as of the date hereof. Except as otherwise

required by law, the Company does not undertake any obligation to publicly release any revisions to these forward-looking statements to reflect events or circumstances after the date hereof or to reflect the occurrence of unanticipated events.

ITEM 7A – QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

Information required under this Item is set forth in the "Quantitative and Qualitative Disclosures about Market Risk" caption at Part II, Item 7, of this Filing.

ITEM 8 – FINANCIAL STATEMENTS AND SUPPLEMENTARY DATA

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All other financial statement schedules are omitted because they are not applicable or because the re-quired information is shown in the Consolidated Financial Statements or Notes thereto.

Report of Independent Registered Public Accounting Firm

To the Stockholders and
Board of Directors of Omnicare, Inc.

We have completed an integrated audit of Omnicare Inc.'s 2004 consolidated financial statements and of its internal control over financial reporting as of December 31, 2004 and audits of its 2003 and 2002 consolidated financial statements in accordance with the standards of the Public Company Accounting Oversight Board (United States). Our opinions, based on our audits, are presented below.

Consolidated Financial Statements and Financial Statement Schedule

In our opinion, the consolidated financial statements listed in the accompanying index present fairly, in all material respects, the financial position of Omnicare, Inc. and its subsidiaries at December 31, 2004 and 2003, and the results of their operations and their cash flows for each of the three years in the period ended December 31, 2004 in conformity with accounting principles generally accepted in the United States of America. In addition, in our opinion, the financial statement schedule listed in the accompanying index presents fairly, in all material respects, the information set forth therein when read in conjunction with the related consolidated financial statements. These financial statements and financial statement schedule are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements and financial statement schedule based on our audits. We conducted our audits of these statements in accordance with the standards of the Public Company

Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit of financial statements includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

As discussed in Notes 1 and 11 to the consolidated financial statements, effective December 31, 2004, the Company adopted the provisions of Emerging Issues Task Force Issue Number 04-08, "The Effect of Contingently Convertible Instruments on Diluted Earnings per Share." Accordingly, 2003 diluted earnings per share has been restated from the amount previously reported.

Internal Control Report of Independent Registered Public Accounting Firm

Also, in our opinion, management's assessment, included in Management's Report on Internal Control Over Financial Reporting appearing under Item 9A, that the Company maintained effective internal control over financial reporting as of December 31, 2004 based on criteria established in Internal Control - Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO), is fairly stated, in all material respects, based on those criteria. Furthermore, in our opinion, the Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 2004, based on criteria established in

Internal Control - Integrated Framework issued by the COSO. The Company's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express opinions on management's assessment and on the effectiveness of the Company's internal control over financial reporting based on our audit. We conducted our audit of internal control over financial reporting in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. An audit of internal control over financial reporting includes obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we consider necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinions.

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (i) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (ii) provide reasonable assurance that transactions are recorded as necessary

to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

/s/ PricewaterhouseCoopers LLP
PricewaterhouseCoopers LLP
Chicago, Illinois
March 15, 2005

CONSOLIDATED STATEMENTS OF INCOME
OMNICARE, INC. AND SUBSIDIARY COMPANIES

(In thousands, except per share data)

	For the years ended December 31,		
	2004	2003	2002
Sales	$4,101,224	$3,474,354	$2,606,450
Reimbursable out-of-pockets	18,667	24,820	26,304
Total net sales	4,119,891	3,499,174	2,632,754
Cost of sales	3,070,856	2,576,794	1,915,397
Reimbursed out-of-pocket expenses	18,667	24,820	26,304
Total direct costs	3,089,523	2,601,614	1,941,701
Gross profit	1,030,368	897,560	691,053
Selling, general and administrative expenses	587,932	509,977	411,272
Restructuring charges (Note 12)	—	—	23,195
Operating income	442,436	387,583	256,586
Investment income	3,184	4,166	3,276
Interest expense (Note 7)	(70,421)	(81,300)	(56,811)
Income before income taxes	375,199	310,449	203,051
Income taxes	139,188	116,081	77,145
Net income	$236,011	$194,368	$125,906
Earnings per share:			
Basic	$2.29	$1.97	$1.34
Diluted (Note 11)	$2.17	$1.89	$1.33
Weighted average number of common shares outstanding:			
Basic	103,238	98,800	94,168
Diluted (Note 11)	112,819	107,896	94,905

The Notes to Consolidated Financial Statements are an integral part of these statements.

* * *

EXHIBIT 31.1

RULE 13a-14(a) CERTIFICATION IN ACCORDANCE WITH SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, Joel F. Gemunder, President and Chief Executive Officer of Omnicare, Inc. (the "Company"), certify that:

1. I have reviewed this report on Form 10-K of the Company;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the Company as of, and for, the periods presented in this report;

4. The Company's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the Company and have:

   a) designed such disclosure controls and procedures, or caused such disclosure controls

and procedures to be designed under our supervision, to ensure that material information relating to the Company, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c) evaluated the effectiveness of the Company's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) disclosed in this report any change in the Company's internal control over financial reporting that occurred during the Company's most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the Company's internal control over financial reporting; and

5. The Company's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the

Company's auditors and the audit committee of the Company's board of directors:

a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the Company's ability to record, process, summarize and report financial information; and

b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting.

Date: March 16, 2005

/s/ Joel F. Gemunder
Joel F. Gemunder
President and Chief Executive Officer

EXHIBIT 31.2

RULE 13a-14(a) CERTIFICATION IN ACCORDANCE WITH SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, David W. Froesel, Jr., Senior Vice President and Chief Financial Officer of Omnicare, Inc. (the "Company"), certify that:

1. I have reviewed this report on Form 10-K of the Company;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements

were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the Company as of, and for, the periods presented in this report;

4. The Company's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the Company and have:

   a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the Company, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

   b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c) evaluated the effectiveness of the Company's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) disclosed in this report any change in the Company's internal control over financial reporting that occurred during the Company's most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the Company's internal control over financial reporting; and

5. The Company's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the Company's auditors and the audit committee of the Company's board of directors:

a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the Company's ability to record, process, summarize and report financial information; and

b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting.

Date: March 16, 2005

/s/ David W. Froesel, Jr.
David W. Froesel, Jr.
Senior Vice President and Chief Financial Officer

Filed Pursuant to Rule 424(b)(5)
Registration No. 333-127616

PROSPECTUS SUPPLEMENT
(To Prospectus dated November 25, 2005)

12,825,000 Shares

[LOGO]

Omnicare

Common Stock

This is an offering by Omnicare, Inc. of 12,825,000 shares of our common stock. We will receive all of the net proceeds from the sale of our common stock.

Our common stock trades on the New York Stock Exchange under the symbol "OCR." The last reported sale price of our common stock on December 12, 2005 was $59.72 per share.

Concurrently with this offering of common stock, we are offering an aggregate of $225 million of 6¾% senior subordinated notes due 2013 and an aggregate of $525 million of 6⅞% senior subordinated notes due 2015, and an aggregate of $850 million of 3.25% convertible senior debentures due 2035. The closing of this offering is conditioned on the closing of the notes offering and the convertible debentures offering.

Investing in our common stock involves risks. "Risk Factors" begin on page S-9 of this prospectus supplement and page 4 of the accompanying prospectus.

	Per Share	Total
Public offering price	$59.7200	$765,909,000
Underwriting discount and commission	$1.7916	$22,977,270
Proceeds to Omnicare, Inc. (before expenses)	$57.9284	$742,931,730

* * *

December 12, 2005

* * *

Our Company

Omnicare is a leading geriatric pharmaceutical services company. We are the nation's largest provider of pharmaceuticals and related pharmacy services to long-term healthcare institutions. Our clients include primarily skilled nursing facilities, assisted living facilities, retirement centers, independent living communities, hospitals, hospice and other healthcare settings. We provide our pharmacy services to long-term care facilities and other chronic care settings comprising approximately 1,441,000 beds in 47 states, the District of Columbia and in Canada. We purchase, repackage and dispense pharmaceuticals, both prescription and non-prescription, and provide computerized medical record keeping and third-party billing for residents in those facilities. We also provide consultant pharmacist services, including evaluating monthly patient drug therapy, monitoring the drug distribution system within the nursing facility, assisting in compliance with state and federal regulations and providing proprietary clinical and health management programs. In addition, we provide ancillary

services, such as administering medications and nutrition intravenously (infusion therapy services) and furnishing respiratory therapy services, medical supplies and equipment and clinical care planning and financial software information systems to our client facilities. As well, we provide operational software and support systems to long-term care pharmacy providers across the United States. We provide pharmaceutical distribution and patient assistance services for specialty pharmaceuticals. We also provide comprehensive product development and research services for the pharmaceutical, biotechnology, medical device and diagnostic industries in 30 countries as of September 30, 2005.

* * *

RISK FACTORS

You should carefully consider the risks described in this prospectus supplement and the accompanying prospectus, in addition to the other information contained or incorporated by reference in this prospectus supplement and the accompanying prospectus, before making an investment decision. These risks are not the only ones facing us. Additional risks and uncertainties not currently known to us or that we currently deem to be immaterial also may materially and adversely affect our business operations. Any of these risks could materially and adversely affect our business, financial condition or results of operations. In such cases, you may lose all or part of your investment.

Risks Relating to our Business

Federal and state healthcare legislation has significantly impacted our business, and future legislation and regulations are likely to affect us.

In recent years, federal legislation has resulted in major changes in the healthcare system, which significantly affected healthcare providers. The Balanced Budget Act of 1997, or BBA, sought to achieve a balanced federal budget by, among other things, changing the reimbursement policies applicable to various healthcare providers. In a significant change for the skilled nursing facility industry, the BBA provided for the introduction in 1998 of the prospective payment system, or PPS, for Medicare-eligible residents of skilled nursing facilities. Prior to PPS, skilled nursing facilities under Medicare received cost-based reimbursement. Under PPS, Medicare pays skilled nursing facilities a fixed fee per patient per day based upon the acuity level of the resident, covering substantially all items and services furnished during a

Medicare-covered stay, including pharmacy services. PPS resulted in a significant reduction of reimbursement to skilled nursing facilities. Admissions of Medicare residents, particularly those requiring complex care, declined in many skilled nursing facilities due to concerns relating to the adequacy of reimbursement under PPS. This caused a weakness in Medicare census leading to a significant reduction of overall occupancy in the skilled nursing facilities we served. This decline in occupancy and acuity levels adversely impacted our results beginning in 1999, as we experienced lower utilization of our services, coupled with PPS-related pricing pressure from our skilled nursing facility customers. The BBA also imposed numerous other cost-saving measures affecting Medicare skilled nursing facility services.

In 1999 and 2000, Congress sought to restore some of the reductions in reimbursement resulting from PPS. We believe this legislation improved the financial condition of skilled nursing facilities and provided incentives to increase occupancy and Medicare admissions, particularly among the more acutely ill. While certain of the payment increases mandated by these laws expired October 1, 2002, one provision gave skilled nursing facilities a temporary rate increase for certain high-acuity patients, including medically-complex patients with generally higher pharmacy costs, beginning April 1, 2000 and ending when the Centers for Medicare & Medicaid Services, or CMS, implements a refined resource utilization group, or RUG, patient classification system that better accounts for medically-complex patients. For several years, CMS did not implement such refinements, thus continuing the additional rate increases for certain high-acuity patients through federal fiscal year 2005. On July 28, 2005, CMS issued, and on August 4, 2005

published in the Federal Register, its final SNF PPS rule for fiscal year 2006. Under the rule, CMS added nine patient classification categories to the PPS patient classification system, thus triggering the expiration of the high-acuity payment add-ons. However, CMS estimates that the rule will have no net financial impact on SNFs in fiscal year 2006 because the $1.02 billion reduction from the expiration of the add-on payments will be more than offset by a $510 million increase in the nursing case-mix weight for all of the RUG categories and a $530 million increase associated with various updates to the payment rates (including updates to the wage and market basket indexes), resulting in a $20 million overall increase in payments for fiscal year 2006. The new patient classification refinements will be effective on January 1, 2006, and the market basket increase became effective October 1, 2005. While the fiscal year 2006 SNF PPS rates will not decrease payments to skilled nursing facilities, the loss of revenues associated with future changes in skilled nursing facility payment rates could, in the future, have an adverse effect on the financial condition of our skilled nursing facility clients which could, in turn, adversely affect the timing or level of their payments to us.

In December 2003, Congress enacted the Medicare Prescription Drug, Improvement and Modernization Act of 2003, or MMA, which includes a major expansion of the Medicare prescription drug benefit under a new Medicare Part D. Until the Part D benefit goes into effect on January 1, 2006, Medicare beneficiaries can receive assistance with their outpatient prescription drug costs through a new prescription drug discount card program, which began in June 2004, and which gives enrollees access to negotiated discounted prices for prescription drugs.

Under the new prescription drug benefit, Medicare beneficiaries may enroll in prescription drug plans offered by private entities (or in a "fallback" plan offered on behalf of the government through a contractor, to the extent private entities fail to offer a plan in a given area), which will provide coverage of outpatient prescription drugs (collectively, "Part D Plans"). Part D Plans will include both plans providing the drug benefit on a stand alone basis and Medicare Advantage plans providing drug coverage as a supplement to an existing medical benefit under that Medicare Advantage plan, most commonly a health maintenance organization plan. Medicare beneficiaries generally will have to pay a premium to enroll in a Part D Plan, with the premium amount varying from plan to plan, although CMS will provide various federal subsidies to Part D Plans to reduce the cost to beneficiaries. Medicare beneficiaries who are also entitled to benefits under a state Medicaid program (so-called "dual eligibles") will have their prescription drug costs covered by the new Medicare drug benefit, including the nursing home residents we serve, whose drug costs are currently covered by state Medicaid programs.

CMS will provide premium and cost-sharing subsidies to Part D Plans with respect to dual eligible residents of nursing homes. Therefore, such dual eligibles will not be required to pay a premium for enrollment in a Part D Plan, so long as the premium for the Part D Plan in which they are enrolled is at or below the premium subsidy. Dual eligible residents of nursing homes will be entitled to have their entire prescription drug costs covered by a Part D Plan, provided that the prescription drugs which they are taking are either on the Part D Plan's formulary, or an exception to the plan's formulary is granted. CMS has

reviewed the formularies of Part D Plans and has indicated that it will require their formularies to include the types of drugs most commonly needed by Medicare beneficiaries. CMS also will ensure and [sic] that plans' formulary exceptions criteria provide for coverage of drugs determined by the plan to be medically necessary for the enrollee.

Pursuant to the Part D final rule, we will obtain reimbursement for drugs we provide to enrollees of a given Part D Plan in accordance with the terms of agreements negotiated between us and that Part D Plan. We have negotiated such agreements with many Part D Plan sponsors under which we will provide drugs and associated services to their enrollees. We continue to negotiate agreements with other Part D Plans. Until all such agreements are finalized and Medicare beneficiaries enroll in the plans, including national, regional and local plans, we will not be able to determine the impact of the new Part D drug benefit on our results of operations or financial condition. The MMA will not change the manner in which Medicare pays for drugs for Medicare beneficiaries covered in a Part A stay. We will continue to receive reimbursement for drugs provided to such residents from the skilled nursing facilities, in accordance with the terms of the agreements we have negotiated with each skilled nursing facility.

Our contractual relationships with pharmaceutical manufacturers can include rebates and other forms of price concessions on the products we purchase. On November 28, 2005 CMS posted to the "Questions and Answers" portion of its website a statement to the effect that it has significant concerns about the continued payment of certain rebates by pharmaceutical manufacturers to long-term care pharmacies with

respect to prescriptions dispensed under the new Medicare Part D prescription drug benefit, and that it is examining this issue closely. We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve. However, there can be no assurance that, if these price concessions were no longer provided to us, there would not be a material adverse effect on our business or results of operations.

CMS has issued other subregulatory guidance on many aspects of the final Part D rule, including the provision of pharmaceutical services to long-term care residents, and the agency will continue to issue guidance as the new program is implemented. We are continuing to monitor implementation of the new Part D benefit, and cannot predict the ultimate effect of the final rule or the outcome of other potential developments relating to its implementation on our business or results of operations.

The MMA also reforms the Medicare Part B prescription drug payment methodology. With certain exceptions, in 2004 most Part B drugs were reimbursed at 85 percent of the April 1, 2003 average wholesale price. In 2005, Medicare Part B payment generally equals 106 percent of the lesser of (i) the wholesale acquisition cost of the product, or (ii) the average sales price, or ASP, of the product, with certain exceptions and adjustments. More significant reforms are planned for 2006, when most drugs will be reimbursed under either an ASP methodology or under a "competitive acquisition program." Our revenues for drugs dispensed under Medicare Part B are not significant in comparison to total revenues. The MMA also includes provisions that will institute

administrative reforms designed to improve Medicare program operations. It is uncertain at this time the impact that the MMA's legislative reforms or future Medicare reform legislation ultimately will have on us.

Discounted average wholesale price, or AWP, plus a dispensing fee is the basis for many state Medicaid programs' reimbursement of drugs to pharmacy providers for Medicaid beneficiaries generally as well as under certain private reimbursement programs. If government or private health insurance programs discontinue or modify the use of AWP or otherwise implement payment methods that reduce the reimbursement for drugs and biologicals, it could adversely affect our level of reimbursement.

With respect to Medicaid, the BBA repealed the "Boren Amendment" federal payment standard for Medicaid payments to Medicaid nursing facilities, effective October 1, 1997, giving states greater latitude in setting payment rates for such facilities. The law also granted states greater flexibility to establish Medicaid managed care programs without the need to obtain a federal waiver. Although these waiver programs generally exempt institutional care, including nursing facilities and institutional pharmacy services, some states do use managed care principles in their long-term care programs. Moreover, no assurances can be given that additional Medicaid programs ultimately will not change the reimbursement system for long-term care, including pharmacy services, from fee-for-service to managed care negotiated or capitated rates. Our operations have not been adversely affected in states with managed care programs in effect. In addition, some states continue to face budget shortfalls, and most states are taking steps to implement cost controls within their Medicaid

programs. Likewise, the federal government may consider changes to Medicaid designed to rein in program spending. A Medicaid Commission has been established to advise the Secretary of HHS on, among other things, ways to achieve $10 billion in Medicaid savings over five years. In addition, Congress is considering various proposals to reduce Medicaid spending. There can be no assurance that future changes in Medicaid payments to pharmacies, nursing facilities or managed care systems will not have an adverse impact on our business. While we have endeavored to adjust to these pricing pressures to date, these pressures are likely to continue or escalate, particularly if economic recovery does not emerge, and there can be no assurance that such occurrence will not have an adverse impact on our business.

Further, in order to rein in healthcare costs, we anticipate that federal and state governments will continue to review and assess alternate healthcare delivery systems, payment methodologies and operational requirements for healthcare providers, including long-term care facilities and pharmacies. Given the continuous debate regarding the cost of healthcare, managed care and other healthcare issues, we cannot predict with any degree of certainty what additional healthcare initiatives, if any, will be implemented or the effect any future legislation or regulation will have on our business. Longer term, funding for federal and state healthcare programs must consider the aging of the population and the growth in enrollees as eligibility is expanded; the escalation in drug costs owing to higher drug utilization among seniors and the introduction of new, more efficacious but also more expensive medications; the implementation of the Medicare drug benefit for seniors; and the long-term financing of the entire

Medicare program. Given competing national priorities, it remains difficult to predict the outcome and impact on us of any changes in healthcare policy relating to the future funding of the Medicare and Medicaid programs. Further, Medicaid and/or Medicare payment rates for pharmaceutical supplies and services may not continue to be based on current methodologies or remain comparable to present levels. Any future healthcare legislation or regulation may adversely affect our business.

Risks Relating to this Offering

We have substantial outstanding debt and we could incur more debt in the future. Any failure to meet our debt obligations would adversely affect our business and financial condition.

At September 30, 2005, on a pro forma basis after giving effect to this offering, the concurrent financing transactions and the use of the net proceeds therefrom, and assuming that 100% of our 8.125% notes are purchased in the related tender offer, our total consolidated long-term debt (including current maturities) would have been approximately $3.1 billion, accounting for approximately 52.1% of our total capitalization. In addition, we and our subsidiaries may be able to incur substantial additional debt in the future. The indentures governing our outstanding notes and the notes offered in the concurrent notes offering contain restrictions on our incurrence of additional debt. These restrictions, however, are subject to a number of qualifications and exceptions, and under certain circumstances, we could incur substantial additional indebtedness in compliance with these restrictions. Moreover, these restrictions do not prevent us from incurring obligations that do not constitute debt under the indentures.

The degree to which we are leveraged could have important consequences to you, including:

- a substantial portion of our cash flow from operations will be required to be dedicated to interest and principal payments and may not be available for operations, working capital, capital expenditures, expansion, acquisitions or general corporate or other purposes;
- our ability to obtain additional financing in the future may be impaired;
- we may be more highly leveraged than our competitors, which may place us at a competitive disadvantage;
- our flexibility in planning for, or reacting to, changes in our business and industry may be limited; and
- our degree of leverage may make us more vulnerable in the event of a downturn in our business or in our industry or the economy in general.

Our ability to make payments on and to refinance our debt will depend on our ability to generate cash in the future. This, to a certain extent, is subject to general economic, business, financial, competitive, legislative, regulatory and other factors that are beyond our control.

We cannot assure you that our business will generate sufficient cash flow from operations or that future borrowings will be available to us under credit facilities in an amount sufficient to enable us to pay our debt or to fund our other liquidity needs. We may need to refinance all or a portion of our debt on or before maturity. We cannot assure you that we would

be able to refinance any of our debt on commercially reasonable terms or at all.

Fluctuations in the stock market as well as general economic and market conditions may harm the market price of our common stock and you may lose all or part of your investment.

The market price of our common stock has been subject to significant fluctuation. The market price of our common stock may continue to be subject to significant fluctuations in response to operating results and other factors, including:

- actual or anticipated quarterly fluctuations in our financial results, particularly if they differ from investors' expectations;
- changes in financial estimates and recommendations by securities analysts;
- general economic, market and political conditions, including war or acts of terrorism, not related to our business;
- actions of our competitors and changes in the market valuations, strategy and capability of our competitors;
- our ability to successfully integrate acquisitions and consolidations; and
- changes in healthcare regulations and the prospects of our industry.

In addition, the stock market in recent years has experienced price and volume fluctuations that often have been unrelated or disproportionate to the operating performance of companies. These fluctuations may harm the market price of our common stock, regardless of our operating results.

The substantial number of shares of our common stock that could be available for sale in the future could cause the market price of our common stock to decline.

Sales of substantial amounts of our common stock in the public market following this offering, or the perception that those sales will occur, could cause the market price of our common stock to decline. These sales and issuances might impair our ability to raise capital through the sale of additional equity securities in the future at a time and at a price that we deem appropriate because investors could purchase shares in the public market instead of directly from us. Upon completion of this offering, we will have 119,837,432 shares of common stock outstanding. All shares sold in this offering will be freely tradable without restriction or further registration under the Securities Act of 1933, as amended. In addition, in connection with our acquisition strategy, we may issue shares of our common stock as consideration in certain acquisition transactions. No prediction can be made as to the effect, if any, that future sales of shares of common stock or the availability of shares of common stock will have on the trading price of our common stock.

Anti-takeover provisions under Delaware law, in our governing documents and under our shareholder rights plan may make an acquisition of us more difficult.

We are a Delaware corporation and the anti-takeover provisions of Delaware law impose various impediments to the ability of a third party to acquire control of our company, even if a change of control would be beneficial to our stockholders. We also have adopted a shareholder rights plan, commonly known as a "poison pill," which could result in the significant

dilution of the proportionate ownership of any person that engages in an unsolicited attempt to take over our company and, accordingly, could discourage potential acquirors. In addition, the terms of our stock option plans may discourage, delay or prevent a change in control of our company.

Certain provisions of our charter also may make an acquisition of us more difficult. Our charter authorizes the issuance of "blank check" preferred stock that could be issued by our board of directors to increase the number of outstanding shares, making a takeover more difficult and expensive. Our charter also provides that a vote of a majority of disinterested stockholders is required in connection with certain transactions involving any stockholder holding 10% or more of our voting stock. In addition, our charter requires a vote of two-thirds of the stockholders to remove a director without cause as well as to amend sections of our charter relating to the removal of directors, the ability of our board of directors to amend the by-laws, the fair price provisions and the elimination of director liability.

The provisions which we have summarized above may reduce the market value of our common stock.

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ABOUT THIS PROSPECTUS

This prospectus is part of a registration statement that we filed with the Securities and Exchange Commission utilizing a "shelf" registration process. Under this shelf process, we may sell any combination of the securities described in this prospectus in one or more offerings up to an aggregate offering price of $2,800,000,000. This prospectus provides you with a general description of the securities we may offer.

Each time we sell securities, we will provide a prospectus supplement that will contain specific information about the terms of that offering. The prospectus supplement may also add, update or change information contained in this prospectus. You should read both the prospectus and any prospectus supplement together with the additional information described under the heading "Where You Can Find More Information."

FORWARD-LOOKING STATEMENTS

In addition to historical information, this prospectus contains certain statements that constitute "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. These forward-looking statements are made on the basis of management's views and assumptions regarding business performance as of the time the statements are made. These forward-looking statements include, but are not limited to, all statements regarding the intent, belief or current expectations regarding the matters discussed or incorporated by reference in this prospectus (including statements as to "beliefs," "expectations," "anticipations," "intentions" or similar words) and all statements which are not statements of historical fact.

Forward-looking statements in this prospectus include, but are not limited to, the following: expectations concerning our financial performance, results of operations, sales earnings or business outlook; expectations regarding acquisitions; trends in the long-term healthcare and contract research industries generally; expectations concerning our ability to leverage our core business; anticipated growth in alternative institutional markets such as correctional facilities, hospice care, mental health and personal

care or supportive living facilities; expectations concerning continued relative stability in the operating environment in the long-term care industry; anticipated demographic trends in the healthcare industry; the impact of drug price inflation; changes in government and other reimbursement formulas to take into account drug price inflation or deflation; the ability to allocate resources in order to enhance gross profit margins; the ability to continue our value creation strategy through expanding its core pharmaceutical business and leveraging that business through the development and expansion of clinical information services; our ability to continue to leverage fixed and variable overhead costs through internal and acquired growth; the impact of our refinancings in enhancing our financial position and providing financial flexibility to support our ongoing growth strategies; other factors affecting our strategy for future growth; the effectiveness of our unit-of-use controls and computerized documentation system; the effectiveness of our health and outcomes management programs; the ability to leverage our contract research organization, or CRO, business and our core pharmacy business as anticipated; expectations concerning product and market development efforts; trends concerning the commencement, continuation or cancellation of CRO projects and backlog; the effectiveness of recent cost reduction efforts in the CRO; volatility in the CRO business; anticipated business performance of the CRO in 2005; expectations in the CRO business resulting from streamlining and globalization efforts, our unique capabilities in the geriatric market and strength of presence in the drug development marketplace; trends in healthcare funding issues, including, but not limited to, state Medicaid budgets, enrollee eligibility,

escalating drug prices due to higher utilization among seniors and the aging of the population; expectations concerning increasing Medicare admissions and improving occupancy rates; the introduction of more expensive medications, and increasing use of generic medications; the impact of any changes in healthcare policy relating to the future funding of the Medicaid and Medicare programs; the cost-effectiveness of pharmaceuticals in treating chronic illnesses for the elderly; the effectiveness of our formulary compliance program; the effectiveness of our pharmaceutical purchasing programs and our ability to obtain discounts and manage pharmaceutical costs; the adequacy and availability of our sources of liquidity and capital; payments of future quarterly dividends; the adequacy of our net cash flows from operating activities, credit facilities and other long and short-term debt financings to satisfy our future working capital needs, acquisition contingency commitments, debt servicing, capital expenditures and other financing requirements for the foreseeable future; the ability, if necessary, to refinance indebtedness or issue additional indebtedness or equity; interest rate risk on our outstanding debt; valuations of derivative instruments embedded in our trust PIERS instruments; the adequacy of our allowance for doubtful accounts; expectations concerning inventory write-offs; the adequacy of insurance expense estimates and methodology; the adequacy of the provisions for current or deferred taxes; the impact of reduced government reimbursement rates to our skilled nursing facility, or SNF, clients which could adversely affect the timing or level of SNF payments to us; the impact of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, or MMA, including the Medicare Part D prescription

drug benefit, effective January 1, 2006, as implemented pursuant to Centers for Medicare & Medicaid Services, or CMS, regulations and subregulatory guidance; the impact of continued pressure on federal and state Medicaid budgets and budget shortfalls which have led to decreasing reimbursement rates and other cost control measures in certain states; our ability to respond to such federal and state budget shortfalls and corresponding reductions in Medicaid reimbursement rates; the effect of any changes and considerations in long-term healthcare funding policies for Medicare and Medicaid programs; expected demand for long-term care; the pace and quality of new drug development targeted at diseases of the elderly; the impact of newer drugs that, although more expensive, are more efficient at treating illness and thereby reduce overall healthcare costs; trends and expectations concerning long-term growth prospects for the geriatric care industry and the containment of healthcare costs for the elderly; expectations concerning the growth in the elderly population; anticipated changes in healthcare delivery systems and payment methodologies in order to fund growing demand; our ability to utilize our expertise in geriatric pharmaceutical care and pharmaceutical cost management and our database on drug utilization and outcomes in the elderly to meet the anticipated challenges of the healthcare environment; the effectiveness of our growth strategy in allowing us to maximize cash flow, maintain a strong financial position, enhance the efficiency of our operations and continue to develop our franchise in the geriatric pharmaceutical market; the ability of expansion in our core business to provide us greater ability to leverage our clinical services and information business, thereby enhancing cost advantages in the institutional

pharmacy market; the belief that new drug discovery will remain an important priority for pharmaceutical manufacturers; and expectations concerning opportunities for future growth and the continued need for pharmaceutical manufacturers to utilize contract research businesses in optimizing research and development efforts.

These forward-looking statements, together with other statements that are not historical, involve known and unknown risks, uncertainties, contingencies and other factors that could cause actual results, performance or achievements to differ materially from those stated. Such risks, uncertainties, contingencies and other factors, many of which are beyond our control, but are not limited to: overall economic, financial, political and business conditions; trends in the long-term healthcare and contract research industries; competition in the pharmaceutical, long-term care and contract research industries; the impact of consolidation in the pharmaceutical and long-term care industries; trends in long-term care occupancy rates and demographics; the ability to attract new clients and service contracts and retain existing clients and service contracts; the ability to consummate pending acquisitions; trends for the continued growth of our businesses; expectations concerning the development and performance of our informatics business; the effectiveness of our formulary compliance program; trends in drug pricing, including the impact and pace of pharmaceutical price increases; delays and reductions in reimbursement by the government and other payors to customers and to us as a result of pressures on federal and state budgets or for other reasons; the overall financial condition of our customers; our ability to assess and react to the financial condition of our customers; the

effectiveness of our pharmaceutical purchasing programs and our ability to obtain discounts and manage pharmaceutical costs; the ability of vendors and business partners to continue to provide products and services to us; the continued successful integration of acquired companies and the ability to realize anticipated revenues, economies of scale, cost synergies and profitability; the continued availability of suitable acquisition candidates; pricing and other competitive factors in the industry; increases or decreases in reimbursement rates and the impact of other cost control measures; the impact on our revenues, profits and margins resulting from market trends in the use of newer branded drugs versus generic drugs; the number and usage of generic drugs and price competition in the drug marketplace; the ability to attract and retain needed management; competition for qualified staff in the healthcare industry; the impact and pace of technological advances; the ability to obtain or maintain rights to data, technology and other intellectual property; the demand for our products and services; variations in costs or expenses; the ability to implement productivity, consolidation and cost reduction efforts and to realize anticipated benefits; the ability of clinical research projects to produce revenues in future periods; the ability to benefit from streamlining and globalization efforts at the CRO; trends concerning CRO backlog; the effectiveness of our implementation and expansion of our clinical and other service programs; the effect of new legislation, government regulations, and/or executive orders, including those relating to reimbursement and drug pricing policies and changes in the interpretation and application of such policies; the impact of the MMA, including the Medicare Part D prescription drug benefit effective

January 1, 2006, as implemented pursuant to CMS regulations and subregulatory guidance; legislation and regulations affecting payment and reimbursement rates for SNFs; trends in federal and state budgets and their impact on Medicaid reimbursement rates; government budgetary pressures and shifting priorities; our ability to adjust to federal and state budget shortfalls; efforts by payors to control costs; our failure or the failure of the long-term care facilities we serve to obtain or maintain required regulatory approvals or licenses; loss or delay of contracts pertaining to the CRO business for regulatory or other reasons; the outcome of litigation; potential liability for losses not covered by, or in excess of, insurance; the impact of differences in actuarial assumptions and estimates pertaining to employee benefit plans; events or circumstances which result in an impairment of, assets, including, but not limited to, goodwill; market conditions which adversely affect the valuation of the trust PIERS instruments; the outcome of audit, compliance, administrative or investigatory reviews; volatility in the market for Omnicare common stock and in the financial markets generally; access to adequate capital and financing; changes in international economic and political conditions and currency fluctuations between the U.S. dollar and other currencies; changes in tax laws and regulations; changes in accounting rules and standards; and other risks and uncertainties described in Omnicare's reports and filings with the Securities and Exchange Commission.

Should one or more of these risks or uncertainties materialize or should underlying assumptions prove incorrect, our actual results, performance or achievements could differ materially from those expressed in, or implied by, such forward-looking statements.

Readers are cautioned not to place undue reliance on these forward-looking statements, which speak only as of the date hereof. Except as otherwise required by law, we do not undertake any obligation to publicly release any revisions to these forward-looking statements to reflect events or circumstances after the date hereof or to reflect the occurrence of unanticipated events.

RISK FACTORS

You should carefully consider the risks described in this prospectus, in addition to the other information contained or incorporated by reference in this prospectus and the applicable prospectus supplement, before making an investment decision. These risks are not the only ones facing us. Additional risks and uncertainties not currently known to us or that we currently deem to be immaterial also may materially and adversely affect our business operations. Any of these risks could materially and adversely affect our business, financial condition or results of operations. In such cases, you may lose all or part of your investment.

Risks Relating to Our Business

Omnicare has substantial outstanding debt and could incur more debt in the future. Any failure to meet its debt obligations would adversely affect Omnicare's business and financial condition.

At December 31, 2004, Omnicare's total consolidated long-term debt (including current maturities) accounted for approximately 39.9% of its total capitalization. In addition, Omnicare and its subsidiaries may be able to incur substantial additional debt in the future. The instruments governing Omnicare's

current indebtedness contain restrictions on Omnicare's incurrence of additional debt. These restrictions, however, are subject to a number of qualifications and exceptions, and under certain circumstances, Omnicare could incur substantial additional indebtedness in compliance with these restrictions, including in connection with potential acquisition transactions. Moreover, these restrictions do not prevent Omnicare from incurring obligations that do not constitute debt under the governing documents.

The degree to which Omnicare is leveraged could have important consequences to you, including:

- a substantial portion of Omnicare's cash flow from operations will be required to be dedicated to interest and principal payments and may not be available for operations, working capital, capital expenditures, expansion, acquisitions, dividends or general corporate or other purposes;
- Omnicare's ability to obtain additional financing in the future may be impaired;
- Omnicare may be more highly leveraged than its competitors, which may place it at a competitive disadvantage;
- Omnicare's flexibility in planning for, or reacting to, changes in its business and industry may be limited; and
- Omnicare's degree of leverage may make it more vulnerable in the event of a downturn in its business or in its industry or the economy in general.

Omnicare's ability to make payments on and to refinance its debt will depend on its ability to generate cash in the future. This, to a certain extent, is subject

to general economic, business, financial, competitive, legislative, regulatory and other factors that are beyond Omnicare's control.

We cannot assure you that Omnicare's business will generate sufficient cash flow from operations or that future borrowings will be available under its credit facilities in an amount sufficient to enable Omnicare to pay its debt or to fund its other liquidity needs. Omnicare may need to refinance all or a portion of its debt on or before maturity. We cannot assure you that Omnicare would be able to refinance any of its debt, including any credit facilities on commercially reasonable terms or at all.

If we or our client institutions fail to comply with Medicaid and Medicare reimbursement regulations, our revenue could be reduced, we could be subject to penalties and we could lose our eligibility to participate in these programs.

Approximately one-half of our pharmacy services billings are directly reimbursed by government sponsored programs. These programs include Medicaid and, to a lesser extent, Medicare. The remainder of our billings are paid or reimbursed by individual residents, long-term care facilities and other third party payors, including private insurers. A portion of these revenues also are indirectly dependent on government programs. The table below represents our approximated payor mix for the last three years:

	2002	2003	2004
State Medicaid programs	46%	47%	48%
Private pay and long-term care facilities (1)	44%	45%	45%
Federal Medicare programs (2)	2%	2%	2%

Other private sources (3)	8%	6%	5%
Totals	100%	100%	100%

(1) Includes payments from skilled nursing facilities on behalf of their federal Medicare program-eligible residents (Medicare Part A) and for other services and supplies, as well as payments from third-party insurers and private pay.

(2) Includes direct billing for medical supplies.

(3) Includes our contract research organization revenues.

The Medicaid and Medicare programs are highly regulated. The failure, even if inadvertent, of us and/or our client institutions to comply with applicable reimbursement regulations could adversely affect our reimbursement under these programs and our ability to continue to participate in these programs. In addition, our failure to comply with these regulations could subject us to other penalties.

Continuing efforts to contain healthcare costs may reduce our future revenue.

Our sales and profitability are affected by the efforts of healthcare payors to contain or reduce the cost of healthcare by lowering reimbursement rates, limiting the scope of covered services, and negotiating reduced or capitated pricing arrangements. Any changes which lower reimbursement levels under Medicaid, Medicare or private pay programs, including managed care contracts, could reduce our future revenue. Furthermore, other changes in these reimbursement programs or in related regulations could reduce our future revenue. These changes may include modifications in the timing or processing of payments and

other changes intended to limit or decrease the growth of Medicaid, Medicare or third party expenditures. In addition, our profitability may be adversely affected by any efforts of our suppliers to shift healthcare costs by increasing the net prices on the products we obtain from them.

Federal and state healthcare legislation has significantly impacted our business, and future legislation and regulations are likely to affect us.

In recent years, federal legislation has resulted in major changes in the healthcare system, which significantly affected healthcare providers. The Balanced Budget Act of 1997, or BBA, sought to achieve a balanced federal budget by, among other things, changing the reimbursement policies applicable to various healthcare providers. In a significant change for the skilled nursing facility industry, the BBA provided for the introduction in 1998 of the prospective payment system, or PPS, for Medicare-eligible residents of skilled nursing facilities. Prior to PPS, skilled nursing facilities under Medicare received cost-based reimbursement. Under PPS, Medicare pays skilled nursing facilities a fixed fee per patient per day based upon the acuity level of the resident, covering substantially all items and services furnished during a Medicare-covered stay, including pharmacy services. PPS resulted in a significant reduction of reimbursement to skilled nursing facilities. Admissions of Medicare residents, particularly those requiring complex care, declined in many skilled nursing facilities due to concerns relating to the adequacy of reimbursement under PPS. This caused a weakness in Medicare census leading to a significant reduction of overall occupancy in the skilled nursing facilities we served. This decline in occupancy and

acuity levels adversely impacted our results beginning in 1999, as we experienced lower utilization of our services, coupled with PPS-related pricing pressure from our skilled nursing facility customers. The BBA also imposed numerous other cost-saving measures affecting Medicare skilled nursing facility services.

In 1999 and 2000, Congress sought to restore some of the reductions in reimbursement resulting from PPS. We believe this legislation improved the financial condition of skilled nursing facilities and provided incentives to increase occupancy and Medicare admissions, particularly among the more acutely ill. While certain of the payment increases mandated by these laws expired October 1, 2002, one provision gave skilled nursing facilities a temporary rate increase for certain high-acuity patients, including medically-complex patients with generally higher pharmacy costs, beginning April 1, 2000 and ending when the Centers for Medicare & Medicaid Services, or CMS, implements a refined resource utilization group, or RUG, patient classification system that better accounts for medically-complex patients. For several years, CMS did not implement such refinements, thus continuing the additional rate increases for certain high-acuity patients through federal fiscal year 2005. On July 28, 2005, CMS issued, and on August 4, 2005 published in the Federal Register, its final SNF PPS rule for fiscal year 2006. Under the rule, CMS added nine patient classification categories to the PPS patient classification system, thus triggering the expiration of the high-acuity payment add-ons. However, CMS estimates that the rule will have no net financial impact on SNFs in fiscal year 2006 because the $1.02 billion reduction from the expiration of the add-on payments will be more than offset by a $510 million increase in the nursing case-mix weight for all of the

RUG categories and a $530 million increase associated with various updates to the payment rates (including updates to the wage and market basket indexes), resulting in a $20 million overall increase in payments for fiscal year 2006. The new patient classification refinements will be effective on January 1, 2006, and the market basket increase became effective October 1, 2005. While the fiscal year 2006 SNF PPS rates will not decrease payments to skilled nursing facilities, the loss of revenues associated with future changes in skilled nursing facility payment rates could, in the future, have an adverse effect on the financial condition of our skilled nursing facility clients which could, in turn, adversely affect the timing or level of their payments to us.

In December 2003, Congress enacted the Medicare Prescription Drug, Improvement and Modernization Act of 2003, or MMA, which includes a major expansion of the Medicare prescription drug benefit under a new Medicare Part D. Until the Part D benefit goes into effect on January 1, 2006, Medicare beneficiaries can receive assistance with their outpatient prescription drug costs through a new prescription drug discount card program, which began in June 2004, and which gives enrollees access to negotiated discounted prices for prescription drugs.

Under the new prescription drug benefit, Medicare beneficiaries may enroll in prescription drug plans offered by private entities (or in a "fallback" plan offered on behalf of the government through a contractor, to the extent private entities fail to offer a plan in a given area), which will provide coverage of outpatient prescription drugs (collectively, "Part D Plans"). Part D Plans will include both plans providing the drug benefit on a stand alone basis and

Medicare Advantage plans providing drug coverage as a supplement to an existing medical benefit under that Medicare Advantage plan, most commonly a health maintenance organization plan. Medicare beneficiaries generally will have to pay a premium to enroll in a Part D Plan, with the premium amount varying from plan to plan, although CMS will provide various federal subsidies to Part D Plans to reduce the cost to beneficiaries. Medicare beneficiaries who are also entitled to benefits under a state Medicaid program (so-called "dual eligibles") will have their prescription drug costs covered by the new Medicare drug benefit, including the nursing home residents we serve, whose drug costs are currently covered by state Medicaid programs.

CMS will provide premium and cost-sharing subsidies to Part D Plans with respect to dual eligible residents of nursing homes. Therefore, such dual eligibles will not be required to pay a premium for enrollment in a Part D Plan, so long as the premium for the Part D Plan in which they are enrolled is at or below the premium subsidy. Dual eligible residents of nursing homes will be entitled to have their entire prescription drug costs covered by a Part D Plan, provided that the prescription drugs which they are taking are either on the Part D Plan's formulary, or an exception to the plan's formulary is granted. CMS has reviewed the formularies of Part D Plans and has indicated that it will require their formularies to include the types of drugs most commonly needed by Medicare beneficiaries. CMS also will ensure and [sic] that plans' formulary exceptions criteria provide for coverage of drugs determined by the plan to be medically necessary for the enrollee.

Pursuant to the Part D final rule, we will obtain

reimbursement for drugs we provide to enrollees of a given Part D Plan in accordance with the terms of agreements negotiated between us and that Part D Plan. We have negotiated such agreements with many Part D Plan sponsors under which we will provide drugs and associated services to their enrollees. We continue to negotiate agreements with other Part D Plans. Until all such agreements are finalized and Medicare beneficiaries enroll in the plans, including national, regional and local plans, we will not be able to determine the impact of the new Part D drug benefit on our results of operations or financial condition. The MMA will not change the manner in which Medicare pays for drugs for Medicare beneficiaries covered in a Part A stay. We will continue to receive reimbursement for drugs provided to such residents from the skilled nursing facilities, in accordance with the terms of the agreements we have negotiated with each skilled nursing facility.

CMS has issued subregulatory guidance on many aspects of the final Part D rule, including the provision of pharmaceutical services to long-term care residents, and the agency will continue to issue guidance as the new program is implemented. We are continuing to monitor implementation of the new Part D benefit, and cannot predict the ultimate effect of the final rule or the outcome of other potential developments relating to its implementation on our business or results of operations.

The MMA also reforms the Medicare Part B prescription drug payment methodology. With certain exceptions, in 2004 most Part B drugs were reimbursed at 85 percent of the April 1, 2003 average wholesale price. In 2005, Medicare Part B payment generally equals 106 percent of the lesser of (i) the

wholesale acquisition cost of the product, or (ii) the average sales price, or ASP, of the product, with certain exceptions and adjustments. More significant reforms are planned for 2006, when most drugs will be reimbursed under either an ASP methodology or under a "competitive acquisition program." Our revenues for drugs dispensed under Medicare Part B are not significant in comparison to total revenues. The MMA also includes provisions that will institute administrative reforms designed to improve Medicare program operations. It is uncertain at this time the impact that the MMA's legislative reforms or future Medicare reform legislation ultimately will have on us.

Discounted average wholesale price, or AWP, plus a dispensing fee is the basis for many state Medicaid programs' reimbursement of drugs to pharmacy providers for Medicaid beneficiaries generally as well as under certain private reimbursement programs. If government or private health insurance programs discontinue or modify the use of AWP or otherwise implement payment methods that reduce the reimbursement for drugs and biologicals, it could adversely affect our level of reimbursement.

With respect to Medicaid, the BBA repealed the "Boren Amendment" federal payment standard for Medicaid payments to Medicaid nursing facilities, effective October 1, 1997, giving states greater latitude in setting payment rates for such facilities. The law also granted states greater flexibility to establish Medicaid managed care programs without the need to obtain a federal waiver. Although these waiver programs generally exempt institutional care, including nursing facilities and institutional pharmacy services, some states do use managed care principles in their long-term care programs. Moreover, no assurances

can be given that additional Medicaid programs ultimately will not change the reimbursement system for long-term care, including pharmacy services, from fee-for-service to managed care negotiated or capitated rates. Our operations have not been adversely affected in states with managed care programs in effect. In addition, some states continue to face budget shortfalls, and most states are taking steps to implement cost controls within their Medicaid programs. Likewise, the federal government may consider changes to Medicaid designed to rein in program spending. A Medicaid Commission has been established to advise the Secretary of HHS on, among other things, ways to achieve $10 billion in Medicaid savings over five years. In addition, Congress is considering various proposals to reduce Medicaid spending. There can be no assurance that future changes in Medicaid payments to pharmacies, nursing facilities or managed care systems will not have an adverse impact on our business. While we have endeavored to adjust to these pricing pressures to date, these pressures are likely to continue or escalate, particularly if economic recovery does not emerge, and there can be no assurance that such occurrence will not have an adverse impact on our business.

Further, in order to rein in healthcare costs, we anticipate that federal and state governments will continue to review and assess alternate healthcare delivery systems, payment methodologies and operational requirements for healthcare providers, including long-term care facilities and pharmacies. Given the continuous debate regarding the cost of healthcare, managed care and other healthcare issues, we cannot predict with any degree of certainty what additional healthcare initiatives, if any, will be implemented or the effect any future legislation or

regulation will have on our business. Longer term, funding for federal and state healthcare programs must consider the aging of the population and the growth in enrollees as eligibility is expanded; the escalation in drug costs owing to higher drug utilization among seniors and the introduction of new, more efficacious but also more expensive medications; the implementation of the Medicare drug benefit for seniors; and the long-term financing of the entire Medicare program. Given competing national priorities, it remains difficult to predict the outcome and impact on us of any changes in healthcare policy relating to the future funding of the Medicare and Medicaid programs. Further, Medicaid and/or Medicare payment rates for pharmaceutical supplies and services may not continue to be based on current methodologies or remain comparable to present levels. Any future healthcare legislation or regulation may adversely affect our business.

If we fail to comply with licensure requirements, fraud and abuse laws or other applicable laws, we may need to curtail operations, and could be subject to significant penalties.

Our pharmacy business is subject to extensive and often changing federal, state and local regulations, and our pharmacies are required to be licensed in the states in which they are located or do business. While we continuously monitor the effects of regulatory activity on our operations and we currently have pharmacy licenses for each pharmacy we operate, the failure to obtain or renew any required regulatory approvals or licenses could adversely affect the continued operation of our business. The long-term care facilities that contract for our services are also subject to federal, state and local regulations and are

required to be licensed in the states in which they are located. The failure by these long-term care facilities to comply with these or future regulations or to obtain or renew any required licenses could result in our inability to provide pharmacy services to these facilities and their residents. We are also subject to federal and state laws that prohibit some types of direct and indirect payments between healthcare providers. These laws, commonly known as the fraud and abuse laws, prohibit payments intended to induce or encourage the referral of patients to, or the recommendation of, a particular provider of items or services. Violation of these laws can result in loss of licensure, civil and criminal penalties and exclusion from the Medicaid, Medicare and other federal healthcare programs.

We expend considerable resources in connection with our compliance efforts. We believe that we are in compliance in all material respects with state and federal regulations applicable to our business.

Federal and state laws that protect patient health information may increase our costs and limit our ability to collect and use that information.

Our company and the healthcare industry generally also are impacted by the Health Insurance Portability and Accountability Act of 1996, or HIPAA, which mandates, among other things, the adoption of standards to enhance the efficiency and simplify the administration of the healthcare system. HIPAA requires the Department of Health and Human Services to adopt standards for electronic transactions and code sets for basic healthcare transactions such as payment and remittance advice ("transaction standards"); privacy of individually identifiable healthcare

information ("privacy standards"); security and electronic signatures ("security standards"), as well as unique identifiers for providers, employers, health plans and individuals; and enforcement. In many of our operations, we are a healthcare provider, required to comply in our operations with these standards and subject to significant civil and criminal penalties for failure to do so. In addition, we provide services to customers that also are healthcare providers and are required to provide satisfactory written assurances to those customers that we will provide those services subject to the requirements of the privacy standards. The transaction standards have gone into effect, although we and most other covered entities in the healthcare industry received an extension until October 2003 to comply. However, in September 2003, CMS acknowledged that not all healthcare providers were capable of submitting HIPAA-compliant claims transactions, and therefore adopted a contingency plan for Medicare that would permit the continued use of non-compliant electronic transactions in order to avoid disruption of providers' cash flow due to rejection of non-HIPAA compliant claims. This contingency plan will continue in effect until terminated by CMS. On February 27, 2004, CMS instructed Medicare carriers and fiscal intermediaries that, as of July 6, 2004, HIPAA non-compliant claims may be paid no earlier than 27 days after receipt, while HIPAA-complaint claims are eligible for payment 14 days from receipt. Most health plans and healthcare providers such as us were required to comply with the privacy standards by April 2003. In February 2003, the Department of Health and Human Services published standards for the security of electronic health information. We were required to comply with the requirements of the security standards by April

2005 and believe that we are in compliance with such standards. CMS published a rule in January 2004 announcing the adoption of the National Provider Identifier as the standard unique health identifier for healthcare providers to use in filing and processing healthcare claims and other transactions. This rule became effective May 23, 2005, with a compliance date of May 23, 2007. Based on current information, we believe we will be able to fully comply with HIPAA requirements, however, at this time we cannot estimate the cost of compliance or if implementation of the HIPAA standards will result in an adverse effect on our operations or profitability, or that of our customers.

We are subject to additional risks relating to our acquisition strategy.

One component of our strategy contemplates our making selected acquisitions. Acquisitions involve inherent uncertainties. These uncertainties include our ability to consummate proposed acquisitions on favorable terms or at all, the effect on acquired businesses of integration into a larger organization and the availability of management resources to oversee the operations of these businesses. The successful integration of acquired businesses will require, among other things:

- consolidation of financial and managerial functions and elimination of operational redundancies;
- achievement of purchasing efficiencies;
- the addition and integration of key personnel; and
- the maintenance of existing business.

Even though an acquired business may have

experienced positive financial performance as an independent company prior to an acquisition, we cannot be sure that the business will continue to perform positively after an acquisition.

We also may acquire businesses with unknown or contingent liabilities, including liabilities for failure to comply with healthcare laws and regulations. We have policies and procedures to conduct reviews of potential acquisition candidates for compliance with healthcare laws and to conform the practices of acquired businesses to our standards and applicable laws. We also generally seek indemnification from sellers covering these matters. We may, however, incur material liabilities for past activities of acquired businesses.

We cannot be sure of the successful completion or integration of any acquisition or that an acquisition will not have an adverse impact on our results of operations or financial condition.

We operate in highly competitive businesses.

The long-term care pharmacy business is highly regionalized and, within a given geographic region of operations, highly competitive. Our largest competitors nationally are Pharmerica, Inc., a subsidiary of AmerisourceBergen Corporation, and Kindred Pharmacy Services, a division of Kindred Healthcare, Inc. In the geographic regions we serve, we also compete with numerous local retail pharmacies, local and regional institutional pharmacies and pharmacies owned by long-term care facilities. While we compete on the basis of quality, cost-effectiveness and the increasingly comprehensive and specialized nature of our services, along with the clinical expertise, pharmaceutical technology and professional support we offer,

competitive pricing pressures may affect our profitability.

Our contract research organization, or CRO, business, competes against other full-service CROs and client internal resources. The CRO industry is highly fragmented with a number of full-service contract research organizations and many small, limited-service providers, some of which serve only local markets. Clients choose a CRO based upon, among other reasons, reputation, references from existing clients, the client's relationship with the organization, the organization's experience with the particular type of project and/or therapeutic area of clinical development, the organization's ability to add value to the client's development plan, the organization's financial stability and the organization's ability to provide the full range of services required by the client.

We are dependent on our senior management team and our pharmacy professionals.

We are highly dependent upon the members of our senior management and our pharmacists and other pharmacy professionals. Our business is managed by a small number of key management personnel who have been extensively involved in the success of our business, including Joel F. Gemunder, our President and Chief Executive Officer. If we were unable to retain these persons, we might be adversely affected. There is a limited pool of senior management personnel with significant experience in our industry. Accordingly, we believe we could experience significant difficulty in replacing key management personnel. Although we have employment contracts with our key management personnel, these contracts generally may be terminated without cause by either party.

In addition, our continued success depends on our ability to attract and retain pharmacists and other pharmacy professionals. Competition for qualified pharmacists and other pharmacy professionals is strong. The loss of pharmacy personnel or the inability to attract, retain or motivate sufficient numbers of qualified pharmacy professionals could adversely affect our business. Although we generally have been able to meet our staffing requirements for pharmacists and other pharmacy professionals in the past, our inability to do so in the future could have a material adverse effect on us.

OUR COMPANY

We are a leading geriatric pharmaceutical services company. We are the nation's largest provider of pharmaceuticals and related pharmacy services to long-term healthcare institutions. Our clients include primarily skilled nursing facilities, assisted living facilities, retirement centers, independent living communities, hospitals, hospice and other healthcare settings. We provide our pharmacy services to long-term care facilities and other chronic care settings, comprising approximately 1,441,000 beds in 47 states, the District of Columbia and in Canada. We purchase, repackage and dispense pharmaceuticals, both prescription and non-prescription, and provide computerized medical record keeping and third-party billing for residents in those facilities. We also provide consultant pharmacist services, including evaluating monthly patient drug therapy, monitoring the drug distribution system within the nursing facility, assisting in compliance with state and federal regulations and providing proprietary clinical and health management programs. In addition, we provide ancillary services, such as administering medications and

nutrition intravenously (infusion therapy services) and furnishing respiratory therapy services, medical supplies and equipment and clinical care planning and financial software information systems to our client facilities. As well, we provide operational software and support systems to long-term care pharmacy providers across the United States. We provide pharmaceutical distribution and patient assistance services for specialty pharmaceuticals. We also provide comprehensive product development and research services for the pharmaceutical, biotechnology, medical device and diagnostic industries in 30 countries at September 30, 2005.

Our primary line of business is the distribution of pharmaceuticals, related pharmacy consulting and other ancillary services, data management services and medical supplies to skilled nursing facilities, assisted living facilities and other providers of healthcare services. We serve this market primarily through our national network of pharmacies, which are dedicated to serving skilled nursing, assisted living and other institutional healthcare facilities and are strategically located throughout the United States. We typically service long-term care facilities within a 150-mile radius of our pharmacy locations and maintain a 24-hour, seven-day per week, on-call pharmacist service for emergency dispensing and delivery and for consultations with the facility's staff or attending physicians. We utilize a unit-of-use distribution system. This means that our prescriptions are packaged for dispensing in individual doses. This differs from prescriptions filled by retail pharmacies, which typically are dispensed in vials or other bulk packaging requiring measurement of each dose by or for the patient. Our delivery system is intended to improve control over pharmaceutical distribution and

patient compliance with drug therapy by increasing the accuracy and timeliness of drug administration. In conjunction with our delivery system, our record keeping/documentation system is designed to result in greater efficiency in nursing time, improved control and reduced waste in client facilities, and lower error rates in both dispensing and administration. We also furnish intravenous administration of medication and nutrition therapy and respiratory therapy services, medical supplies and equipment and clinical care planning and software support systems. We believe we distinguish ourselves from many of our competitors by also providing proprietary clinical programs. For example, we have developed a ranking of drugs based on their relative clinical effectiveness for the elderly and by cost to the payor. We use these rankings, which we call the *Omnicare Geriatric Pharmaceutical Care Guidelines®*, or *Omnicare Guidelines*, to more effectively manage patient care and costs. In addition, we provide health and outcomes management programs for the large base of elderly residents of the long-term care facilities we serve.

Our principal executive offices are located at 100 East RiverCenter Boulevard, Covington, Kentucky, 41011, and our telephone number is (859) 392-3300. Our corporate website address is www.omnicare.com. Information contained on our website is not part of this prospectus.

News

Omnicare Completes Voluntary Settlement Agreement

COVINGTON, Ky. — (BUSINESS WIRE) — Nov. 3, 2009 — Omnicare, Inc. (NYSE:OCR) today announced that it has finalized a previously disclosed agreement in principle for a voluntary civil settlement with the U.S. Attorney's Office, District of Massachusetts, the Departments of Justice and Health and Human Services, as well as various of the states in which the Company does business. The settlement relates to the previously disclosed investigation with respect to qui tam complaints filed against the Company. The Company cooperated fully with the review of these matters and is pleased to have reached a resolution.

The Settlement Agreement does not include any finding of wrongdoing or any admission of liability by Omnicare. The Company denies the contentions of the federal government and the qui tam relators as set forth in the complaints and further denies any liability related to those contentions. The allegations include claims that the Company purportedly purchased a medical supply business at an above-market price to induce the referral of business; allegedly received improper payments from pharmaceutical manufacturers; and purportedly provided consultant pharmacist services to customers at below cost and fair market value to induce the referral of business. The Company agreed to settle the matters in order to avoid expensive and time-consuming litigation and to focus on its mission of providing high-quality pharmaceutical care for the frail elderly.

Under the terms of the Settlement Agreement, Omnicare has agreed to pay $98 million plus interest (from June 24, 2009, the date of the aforementioned

agreement in principle) to the federal government and the participating states and the District of Columbia and related expenses. Consistent with previous disclosure, this amount has been reserved by Omnicare. Omnicare has also voluntarily entered into an Amended and Restated Corporate Integrity Agreement (CIA) with the Department of Health and Human Services. The CIA will be in effect for a period of five years and provides for, among other things, training and oversight to demonstrate Omnicare's commitment to comply with the applicable laws and regulations governing pharmacies.

* * *

Source: Omnicare, Inc.

Omnicare, Inc.
Cheryl D. Hodges, 859-392-3331

* * *

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HEADLINE: Omnicare Inc. site searched

BYLINE: By James McNair Enquirer staff writer

BODY:

AG alleges Medicaid fraud

The Ohio Attorney General's Office said Wednesday that it conducted a court-approved search of an Omnicare Inc. operation in Dublin, Ohio, last week in pursuit of evidence to support suspected acts of Medicaid fraud.

The search warrant issued Jan. 10 by Franklin County Municipal Judge Mark Brandt authorized agents of the AG's Medicaid Fraud Control Unit and the Dublin Police Department to search the offices of Omnicare Health Network on Blazer Parkway just north of Columbus. Its owner, Covington-based Omnicare Inc., is the nation's biggest supplier of drugs to nursing homes.

The search took place on Jan. 11.

"Within these offices, documents and records are being kept that are applicable to the scheme, plan or system of OHN in the commission of Medicaid fraud," states the search warrant obtained Wednesday by The Enquirer.

No charges have been filed. Kim Norris, a spokeswoman for attorney general Jim Petro, would not elaborate on the case.

"We have an investigation under way into possible Medicaid fraud," Norris said. "We executed a search warrant on Omnicare's location in Dublin, and we were able to seize some records. That's where it stands right now."

Omnicare spokesman Andy Brimmer said company policies forbid it from discussing possible governmental reviews but also call for cooperation with authorities.

"That said, we have received a letter with certain allegations from two former employees," Brimmer said. "We reviewed the allegations and, while our review is still ongoing, we believe the allegations are unfounded." He would not say whether the allegations mirrored those of the state.

The search warrant allowed the state agents to seize documents related to the sale of medical equipment, such as wheelchairs and walkers, going back to Jan. 1, 2002. It also let them take employee records, computers, computer storage media and records related to billings of the Medicaid and Medicare programs.

Only three weeks into the new year, Omnicare Inc. has twice been on the receiving end of subpoenas or search warrants.

The company, which has more than $6 billion in annual revenue, said last Friday it had received administrative subpoenas from the U.S. Attorney's office in Boston for information about its "relationships" with drug makers and distributors it didn't

name. It said the government and certain unnamed states are investigating allegations of dosage substitutions for three generic drugs.

News of the Boston subpoena may have contributed to a 3 percent drop in Omnicare's stock price Tuesday. Signaling to investors that the Ohio case presents no cause for similar alarm, Omnicare said its durable goods unit in Dublin is an "extremely immaterial subsidiary to the company."

* * *

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION at COVINGTON

[Filed December 30, 2010]

Civil Action No. 2:06-cv-00026-WOB
(Consolidated)

INDIANA STATE DISTRICT COUNCIL OF LABORERS AND HOD CARRIERS PENSION AND WELFARE FUND, on Behalf of Itself and All Others Similarly Situated,

Plaintiff,

vs.

OMNICARE, INC., *et al.*,

Defendants.

CLASS ACTION

[PROPOSED] SECOND AMENDED CONSOLIDATED [ALSO KNOWN AS "THIRD AMENDED COMPLAINT" OR "TAC"] COMPLAINT FOR VIOLATIONS OF § 11 OF THE SECURITIES ACT OF 1933

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NATURE OF THE ACTION

1. Lead Plaintiff Laborers District Council Construction Industry Pension Fund and named plaintiff Cement Masons Local 526 Combined Funds bring this securities class action on behalf of themselves and all persons who purchased the publicly traded securities of Omnicare, Inc. ("Omnicare" or the "Company") pursuant or traceable to a false Registration Statement and Prospectus issued in connection with Omnicare's public offering of 12,825,000 shares on or about December 15, 2005 (the "December 2005 Offering" or "Offering").[1] This action asserts violations of § 11 of the Securities Act of 1933 ("Securities Act") against Omnicare and its senior insiders, Joel F. Gemunder ("Gemunder"), David W. Froesel, Jr. ("Froesel"), Cheryl D. Hodges ("Hodges"), Edward L. Hutton ("Hutton") and Sandra E. Laney ("Laney").

2. Omnicare is the nation's largest provider of pharmaceutical care for the elderly. The Company operates in two business segments, Pharmacy Services and Contract Research Organization Services. This complaint arises out of Omnicare's Pharmacy Services, the Company's core business which generated approximately $5.1 billion in revenue in 2005, or 97% of the Company's total of $5.3 billion in revenue for that year.

3. As part of its Pharmacy Services Division, Omnicare provides consultant pharmacy services in Long Term Care Facilities ("LTCFs"), ostensibly to assist LTCFs with evaluating monthly patient drug therapy, monitoring drug distribution, complying

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[1] At the same time, Omnicare also raised $750 million of senior subordinated notes and $977.5 million of convertible senior debentures.

with state and federal law and implementing clinical and health management programs. In order to do so, Omnicare maintains an extensive network of pharmacy consultants who provided on-site pharmacy consulting services to LTCFs. By 2005, the Company was serving approximately 1,452,000 LTCF patients in thousands of facilities throughout the United States.

INTRODUCTION

> The pride of medicine as a profession has always been its freedom from the taint of barter and trade in the sick patient. Physicians must give their wholehearted devotion to the care of the patient; no other objective must be given precedence over considerations of the patient's need.

"Rebates, Kickbacks, Commissions and Medical Ethics," *Journal of the American Medical Association*, 136(3):176-177 (1948).

4. From 2000 (and prior), until the time of the December 2005 Offering, "barter and trade" in the captive population of elderly LTCF residents was Omnicare's *modus operandi* to achieve its revenue and profit goals. The more than 1.4 million aged and ailing LTCF residents who relied on Omnicare for their pharmaceutical needs were but an afterthought in the Company's plan to drive sales of high-profit drugs. Pursuant to internal assessments of drug-profitability, Omnicare utilized its pharmacy services to engage in extensive therapeutic interchange programs designed to market and sell high-profit drugs to LTCF

patients.[2] Omnicare often implemented such initiatives in order to effect kickback arrangements with pharmaceutical manufacturers, whereby the Company received rebates in exchange for promoting the manufacturers' drugs.

5. The Company's profit-driven therapeutic interchange practices are detailed in numerous complaints filed by former Omnicare employees who blew the whistle on Omnicare. *See* Exs. 1-3.[3] The conduct alleged by the relators is corroborated by confidential witnesses as well as the United States Department of Justice ("DOJ"), which investigated the relators' claims and found that Omnicare had indeed "solicited and received kickbacks from pharmaceutical manufacturers to recommend the use of their drugs to elderly patients in nursing homes, including powerful antipsychotic drugs used to control their behavior." Ex. 4 (Tony West, Assistant Attorney General for the Civil Division of the DOJ). *See also* Ex. 5.

6. A complaint filed against Johnson & Johnson ("J&J") by the United States Attorney's Office in the District of Massachusetts and the DOJ on behalf of the United States Department of Health and Human Services ("HHS") demonstrates Omnicare's role in illegally promoting J&J drugs in violation of the Federal

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[2] Therapeutic "initiatives," "interchanges" and "interventions" are used interchangeably and are also referred to as "clinical" or "health management" initiatives designed to steer physicians and patients towards specific drugs.

[3] *Kammerer v. Omnicare, Inc.*, No. 05-11518-RGS (D. Mass. Dec. 5, 2008); *Maguire v. Omnicare, Inc.*, No. 02-cv-11436-RGS (D. Mass. June 21, 2005); *Lisitza v. Omnicare, Inc.*, No. 01 C 7433 (N.D. Ill. Jan. 23, 2003). An exhibit index is attached before Exhibit 1.

Anti-Kickback Statute. Ex. 6.[4] The U.S. J&J complaint contains previously undisclosed internal Omnicare and J&J corporate documents, revealing striking details of Omnicare's illegal promotion of J&J drugs in exchange for kickbacks. Another complaint filed against Omnicare and numerous pharmaceutical manufacturers by the U.S. and several states reveals the depth of Omnicare's kickback scheme, which extended to many other drug manufacturers in addition to J&J. Ex. 1. Omnicare's schemes to promote pharmaceutical manufacturers' drugs were approved and implemented at Omnicare's highest levels of management. *See, e.g.*, Ex. 7 at JNJ298613 (Defendant and Chief Executive Officer ("CEO") Gemunder advised J&J that Omnicare would continue to implement the Risperdal Initiative to promote the J&J drug).

7. The documents unsealed in the U.S. action against J&J demonstrate that Omnicare, at the pharmaceutical manufacturer's urging, also conducted therapeutic initiatives that targeted drugs, including Risperdal, for off-label use, or uses unapproved by the Food and Drug Administration ("FDA"). *Id.*; Ex. 6. In order to obtain FDA approval for a drug, a manufacturer must provide clinical evaluations of the drug's safety and efficacy for the indicated use. The FDA strictly forbids manufacturers from advertising that a drug is safe and effective for unapproved uses or unapproved patient populations. Such marketing is referred to as "off-label" marketing. As to Risperdal, J&J's Janssen division obtained FDA approval for Risperdal only to treat schizophrenia and the FDA specifically rejected the drug for the treatment of

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[4] *United States of America, ex rel. Lisitza and Kammerer v. Johnson & Johnson*, No. 07-10288-RGS (D. Mass. Jan. 15, 2010).

elderly patients with dementia. This denial notwithstanding, Omnicare and J&J jointly developed initiatives pursuant to their illegal kickback arrangements to push Risperdal on nursing home patients with dementia. Exs. 8 at JNJ001100; 9 at OMNI-MA035232; 10 at JNJ001036; 11 at JNJ301399. As predicted by the FDA denial of Risperdal to treat the elderly, Omnicare's off-label promotion of Risperdal was linked to increased incidence of cerebrovascular adverse events, including stroke and even death.

8. Omnicare further violated the Federal Anti-Kickback Statute by paying tens of millions of dollars to LTCFs in order to obtain or maintain pharmacy services contracts with Omnicare. Exs. 12-13.[5] Contracts for pharmacy services provided Omnicare with its primary vehicle to elicit kickbacks from pharmaceutical manufacturers and drive sales of high-profit drugs. More whistleblower actions filed against Omnicare detail the Company's willingness to violate the law in order to secure these contracts. For example, in 2004, Omnicare was threatened with the loss of its pharmacy service contracts with Mariner Health Care ("Mariner") nursing homes, which generated approximately $150 million in revenue per year. In order to salvage its Mariner contracts, the Company agreed to enter into sham acquisitions that resulted in Omnicare's payment of nearly $50 million in kickbacks and caused the Company to overstate revenue and operating income on its income statement and the goodwill asset on its balance sheet. *See* Ex. 12.

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[5] *United States of America, ex rel. Resnick v. Omnicare, Inc.*, No. 06-cv-10149-RGS (D. Mass. Mar. 4, 2009); *United States of America and the States of Florida and Illinois, ex rel. v. Omnicare, Inc.*, No. 07-C-5777 (N.D. Ill. Dec. 21, 2010).

In the same year, Omnicare entered into a similar transaction with Total Pharmacy, which maintained pharmacy services contracts with LTCFs controlled by the father of one of Total Pharmacy's owners. Omnicare acquired Total Pharmacy and paid kick-backs to one of its owners for arranging to extend the duration of the pharmacy services contracts with Omnicare from one to ten years. As a result, Omnicare overstated its revenue and operating income by the additional amount of the payments it made to the owners of Total Pharmacy to acquire the nursing homes' business. *See* Ex. 13.

9. The Company maintained equally dubious practices with regard to its doubtful accounts receivable – practices that were also linked to illicit revenue generation. In essence, Omnicare not only failed to write-off uncollectible accounts, many of which were six months or more past-due, but also refused to collect on certain past-due accounts because it had collaborated with the LTCFs to ignore certain charges in exchange for the LTCFs' agreement to prescribe more drugs than necessary to treat its patients, thereby enabling Omnicare to overbill Medicaid and book even more revenue that it was not entitled to record.

10. At the time of the December 2005 Offering, investors remained wholly unaware of the Company's practices. Concealing the profit-driven nature of its therapeutic initiatives, defendants falsely advised investors that Omnicare was dedicated to improving the quality of resident care and that its therapeutic interchanges were meant to "*provide [patients with] . . . more efficacious and/or safer drugs than those*

presently being prescribed."[6] Rather than disclose its kickback arrangements with pharmaceutical manufacturers, defendants provided false assurances to investors that Omnicare's contracts with manufacturers were "*legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.*" These and other statements contained the Registration Statement and Prospectus were materially false and misleading and failed to apprise investors of the true nature of Omnicare's business.

11. As a result of the aforementioned conduct Omnicare grossly overbilled Medicaid and Medicare in violation of the False Claims Act, 31 U.S.C. § 3729.[7] Accordingly, the Registration Statement and Prospectus contained materially false financial information, overstating revenue and misstating other financial metrics by millions of dollars.

JURISDICTION AND VENUE

12. The claims asserted herein arise under and pursuant to § 11 of the Securities Act, 15 U.S.C. §§ 77k.

13. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and § 22 of the Securities Act.

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[6] Here, as elsewhere, emphasis has been added unless otherwise noted.

[7] Omnicare delivers pharmaceuticals and other services to patients in LTCFs and requests reimbursement for those drugs and services from Medicaid, Medicare and other insurers. Between 2000 and 2005, Medicaid and Medicare reimbursements constituted 46%-50% of Omnicare's payor mix. Accordingly, Omnicare received approximately half of its revenue directly from these government sources, increasing from $1 billion in 2000 to nearly $2.5 billion in 2005.

14. Venue is proper in this District pursuant to § 22 of the Securities Act. The false and misleading Registration Statement and Prospectus was issued from this District. Omnicare's executive officers are located in Covington, Kentucky, where the day-to-day operations of the Company are directed and managed.

THE PARTIES

15. Plaintiff Laborers District Council Construction Industry Pension Fund purchased 1,210 shares of Omnicare common stock at $59.72 per share on December 12, 2005 in Omnicare's Offering, as set forth in the Certification filed with the Court on October 31, 2006 (Doc. No. 35).

16. Plaintiff Cement Masons Local 526 Combined Funds purchased 790 shares of Omnicare common stock at $59.72 per share on December 12, 2005 in Omnicare's Offering, as set forth in the Certification filed with the Court on April 3, 2006 (Doc. No. 16).

17. Defendant Omnicare provides pharmaceutical care for elderly people in the United States and Canada. The Company operates through two segments, Pharmacy Services and Contract Research Organization Services. Omnicare's securities traded in an efficient market on the New York Stock Exchange ("NYSE") under the symbol OCR.

18. Defendant Gemunder was, at all relevant times, CEO, President and a director of Omnicare. Gemunder directed the Company in selling more than $2.5 billion worth of Omnicare securities pursuant to the Offering, including the stock offering at issue. Defendant Gemunder prepared and signed the false and misleading Registration Statement and Prospectus, the FY 2004 Form 10-K and all 2005 interim financial reports.

19. Defendant Froesel was, at all relevant times, Chief Financial Officer ("CFO") and Senior Vice President of Omnicare. Froesel assisted the Company in selling more than $2.5 billion worth of Omnicare securities pursuant to the Offering, including the stock offering at issue. Defendant Froesel prepared and signed the false and misleading Registration Statement and Prospectus, the FY 2004 Form 10-K and all 2005 interim financial reports.

20. Defendant Hodges was, at all relevant times, Secretary and Senior Vice President of Omnicare. Hodges assisted the Company in selling more than $2.5 billion worth of Omnicare securities pursuant to the Offering, including the stock offering at issue. Defendant Hodges prepared and signed the false and misleading Registration Statement and Prospectus, the FY 2004 Form 10-K and all 2005 interim financial reports.

21. Defendant Hutton was, at all relevant times, Chairman of the Board of Omnicare. Hutton assisted the Company in selling more than $2.5 billion worth of Omnicare securities pursuant to the Offering, including the stock offering at issue. Defendant Hutton prepared and signed the false and misleading Registration Statement and Prospectus, the FY 2004 Form 10-K and all 2005 interim financial reports.

22. Defendant Laney was, at all relevant times, a director of Omnicare. Laney assisted the Company in selling more than $2.5 billion worth of Omnicare securities pursuant to the Offering, including the stock offering at issue. Defendant Laney prepared and signed the false and misleading Registration Statement and Prospectus, the FY 2004 Form 10-K and all 2005 interim financial reports.

THE DECEMBER 2005 OFFERING

23. On December 15, 2005, Omnicare completed a public offering of 12.8 million shares of common stock at $59.47 per share, raising more than $765 million in proceeds via a Registration Statement and Prospectus declared effective with the Securities and Exchange Commission ("SEC") on December 14, 2005 on Form 424B5 (the "Registration Statement"). The Offering was initially registered with the SEC on Form S-3 filed on or about August 17, 2005, later amended on November 23, 2005 (S-3/A) as Amendment No. 1.

24. The Registration Statement contained summary consolidated financial information for 2002, 2003 and 2004 as well as for the nine months ended September 30, 2005 and incorporated certain financial statements as follows:

> We have elected to "incorporate by reference" certain information into this prospectus supplement. By incorporating by reference, we can disclose important information to you by referring you to another document we have filed separately with the SEC. The information incorporated by reference is deemed to be part of this prospectus supplement, except for information incorporated by reference that is superseded by information contained in any document we subsequently file with the SEC that is incorporated or deemed to be incorporated by reference in this prospectus. Likewise, any statement in this prospectus supplement or any document which is incorporated or deemed to be incorporated by reference herein will be deemed to have been modified or superseded to the extent that any statement contained in any document that we subsequently file with the SEC that is incorporated or deemed

to be incorporated by reference herein modifies or supersedes that statement. We are incorporating by reference the following documents that we have previously filed with the SEC (other than information in such documents that is deemed not to be filed):

(a) Omnicare, Inc.'s Annual Report on Form 10-K for the fiscal year ended December 31, 2004, filed March 16, 2005 including the portions of our proxy statement and related supplement incorporated by reference therein;[8]

(b) Omnicare, Inc.'s Quarterly Reports on Form 10-Q for the fiscal quarters ended March 31, 2005 and June 30, 2005, filed May 10, 2005 and August 9, 2005, respectively, and Form 10-Q/A for the fiscal quarter ended September 30, 2005, filed November 23, 2005;

(c) Omnicare, Inc.'s Current Reports on Form 8-K and Form 8-K/A, as applicable, filed March 9, 2005, March 29, 2005, May 20, 2005, July 7, 2005, July 8, 2005, July 14, 2005, August 3, 2005, August 11, 2005, October 13, 2005, November 23, 2005, November 23, 2005, November 23, 2005, and December 9, 2005.

25. On December 15, 2005, the Company issued a press release entitled "Omnicare Completes Offerings of $750 Million of Senior Subordinated Notes, $977.5 Million of Convertible Senior Debentures and 12,825,000 Shares of Common Stock." The release stated in part:

Omnicare, Inc. (the "Company") today announced that it has completed its offering of 12,825,000

[8] The Company's 2004 Form 10-K included summary financial information for the years 2000-2004.

shares of common stock (not including the underwriters' option to purchase additional shares) at $59.72 per share, and also has completed its offerings of $225 million aggregate principal amount of 6 3/4% senior subordinated notes due 2013, $525 million aggregate principal amount of 6 7/8% senior subordinated notes due 2015 and its offering of $977.5 million aggregate principal amount of 3.25% convertible senior debentures due 2035 (including the exercise in full by the underwriters of their option to purchase additional debentures).

SUBSTANTIVE ALLEGATIONS

26. Between 2000 and 2005 (the period covered by the Registration Statement), Omnicare engaged in a host of conduct designed to increase the Company's revenue and profit. Omnicare's conduct, however, also violated numerous state and federal laws and regulations and caused substantial harm to the healthcare system and LTCF patients. As a result, the Company's 2005 Registration Statement contained materially false and misleading statements and omitted material information that was either required to be stated therein or necessary to make the Registration Statement not misleading.

Therapeutic Initiatives

27. In the Registration Statement, defendants made false and misleading statements and omitted material information concerning Omnicare's therapeutic interchange programs which, unbeknownst to investors, served as a vehicle for defendants to drive sales of high-profit drugs to meet internal revenue and profit goals and/or drive market share for phar-

maceutical manufacturers. The Registration Statement stated the following about Omnicare's Pharmacy Services provided to LTCFs:

> *When required and/or specifically requested by the physician or patient, branded drugs are dispensed and generic drugs are substituted in accordance with applicable state and federal laws as requested by the physician or resident. Subject to physician approval and oversight, and in accordance with our pharmaceutical care guidelines, we also provide for patient-specific therapeutic interchange of more efficacious and/or safer drugs for those presently being prescribed.*

The Registration Statement also specifically discussed Omnicare Pharmacy Consultants' practices concerning drug regimen reviews, stating:

> The services offered by our consultant pharmacists include:
>
> * * *
>
> *monthly drug regimen reviews for each resident in the facility to assess the appropriateness and efficacy of drug therapies, including a review of the resident's current medication usage, monitoring drug reactions to other drugs or food, monitoring lab results and recommending alternate therapies, dosing adjustments or discontinuing unnecessary drugs.*

28. The statements in ¶27 above, were materially false and misleading when made because defendants failed to disclose the true facts, detailed in ¶¶29-45, below, which demonstrate that Omnicare utilized its Pharmacy Consulting Services to: (1) implement therapeutic initiatives designed to increase Omnicare's revenue and profit rather than provide patients with

more appropriate, efficacious and/or safer drugs; (2) effect its profit-driven drug-substitution initiatives by providing physicians with false clinical and other data concerning the efficacy, safety or cost of a drug; and (3) switch the form or dosage of patients' drug prescriptions to more profitable drugs even without physician approval.

29. Between 2000-2005, Omnicare engaged in an extensive campaign to increase revenue and profit by implementing therapeutic initiatives, which were essentially marketing programs designed to switch LTCF patients' prescriptions to high-profit drugs. Omnicare's practices were motivated by the Company's internal assessments of a particular drug's profitability as well as its contractual arrangements with pharmaceutical manufacturers. Indeed, one pharmaceutical manufacturer noted that Omnicare's willingness to employ initiatives to promote and steer patients towards specific drugs was "highly motivated based on economics," which depended "less on net costs [to payers], and more on quality of product and 'spread' (their margin)." Ex. 14 at JNJ284630. According to the same manufacturer, Omnicare was able to effect dramatic shifts in utilization from one drug to another, but "in order to have the Omnicare's of the world drive share that high, it must be financially wor[th] their while." Ex. 15 at JNJ284585.

30. Statements made by confidential witnesses and former employees who blew the whistle on Omnicare detail the Company's profit-driven drug-substitution initiatives. According to these witnesses, Omnicare made ongoing assessments of drugs' profitability and, in order to convince physicians to prescribe the most profitable drugs, prepared false clinical assessments indicating that the most profitable drug was also,

conveniently, the cheapest and most efficacious. The Company would then implement therapeutic interchanges to drive sales of high-profit drugs. Omnicare even directed its employees to switch patients' drug prescriptions without physician authorization.

31. David Kammerer ("Kammerer"), the former Director of Medicaid Reimbursement at Omnicare until 2002 who worked directly with Omnicare's top management, explained that Omnicare made ongoing assessments of the profitability of drugs prescribed to LTCF patients and implemented clinical initiatives designed to push patients from lower-profit to higher-profit drugs. As part of Kammerer's regular job responsibilities, he developed models to determine which drug (*e.g.*, Ranitidine, Axid, Pepcid/Famotidine) and which form of the particular drug (tablet or capsule) was the most profitable for each state in which Omnicare operated. Ex. 16 at 4-5.[9] Utilizing this information, Kammerer generated profit forecasts that were based on "how much Omnicare market share could be moved from one drug (or drug form) to another drug (or drug form)." *Id.* at 5.

Kammerer developed company-wide and regional forecasts for a specific drug-switching initiative. *Id.* at 4-5. According to Kammerer, if the drug switch would increase Omnicare's profitability, then management, including defendant Joel Gemunder, would approve

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[9] Kammerer prepared the models using Omnicare's "dead net" acquisition cost for each drug, which was highly confidential and only available to a select few at Omnicare, including defendant Gemunder, Chief Operating Officer ("COO") Patrick Keefe ("Keefe"), Senior Vice President of Purchasing & Professional Services Tim Bien ("Bien"), and a few people in the purchasing department. These highly confidential "dead net" costs were never shared with the government, other third parties or with Omnicare pharmacies. *Id.* at 5.

the initiative and direct its Regional Vice Presidents, Regional Clinical Directors, Operations Managers and Consultant Coordinators to make the switch. Ex. 1 at ¶41; 16 at 3-5.

32. Kammerer, working directly with Omnicare's top management, was responsible for evaluating and increasing the profitability of Omnicare's clinical initiatives and monitoring pharmacies' compliance with those initiatives. *Id.* Kammerer met up to ten times daily with Bien, a direct report to defendant Gemunder, to discuss profits derived from clinical initiatives as well as pharmacies' compliance with Omnicare initiatives. *Id.* Kammerer also discussed Omnicare's profits and clinical initiatives with defendants Gemunder and Froesel, as well as COO Keefe, who, along with Bien, Kammerer considered to be the top four officers at Omnicare. *Id.* Occasionally, Gemunder even contacted Kammerer at home to discuss these matters. *Id.* It was Bien's responsibility to approve or disapprove clinical initiatives, and Gemunder occasionally participated in the approval process as well. *Id.*

33. CW1, a former Executive Assistant at Omnicare's Midwest Regional Headquarters in Missouri between 1998 and 2005, stated that Omnicare employed these therapeutic interchanges designed to boost Company revenue at least once or twice per quarter. According to CW1, Froesel held conference calls with all of Omnicare's Regional CFOs ("RCFO") and their delegates (the operations and clinical heads and certain financial support persons on the Regional staff), including CW1, during which Froesel advised the call participants that either the whole Company, a particular region or a particular subsidiary pharmacy, required a revenue boost to make its monthly or

quarterly revenue and/or earnings numbers. During these calls, Froesel identified the financial shortfall and then directed the regional or subsidiary pharmacies to employ a "health management initiative," *i.e.* take steps to gain the required extra revenue by substituting higher priced drugs for the lower priced drugs currently prescribed to patients. CW1 had access to his/her Region's financial information because CW1 attended monthly managers meetings discussing Regional financials, was responsible for assembling the monthly financial statements prepared by Omnicare's pharmacies in the Midwest Region, and compiled financial presentations for the Corporate Office. CW1 stated that the Region always had difficulty meeting earnings numbers and "never had any breathing room."

34. According to CW1, in order to justify the drug-switching initiative, CFO Froesel directed Omnicare's RCFOs to create "clinical case studies" to support the proposition that the target drug was more effective and/or more cost effective than the competing drug currently being prescribed. The RCFOs then conferred with the Regional Clinical Director to "put the clinical spin" on the drugs identified for substitution, with the goal that the "clinical program would bring the desired price and revenue increase."

35. In the Midwest Region, the RCFO was Douglas Pepper ("Pepper") and the Regional Clinical Director was Joseph Gruber ("Gruber"). In addition to Pepper and CW1, Mark Price ("Price") and Steve McConnell of the regional operations team participated in the calls with Froesel. According to CW1, after Froesel's call, Pepper and Price would discuss operations aspects of the drug substitution initiative and then confer with Gruber to "put the clinical spin on it."

CW1 worked closely with Gruber when developing the clinical justification for the initiative.

36. CW1 explained that in order to develop the "clinical spin," the Regional Clinical Officers (Gruber in the Midwest Region) met with the Corporate Clinical Officers, including Lisa Welford ("Welford"), Corporate Director for Clinical Operations who led these drug-substitution efforts, and Barbara Zarnowitz ("Zarnowitz"), Corporate Chief Clinical Officer. Both Welford and Zarnowitz were in charge of developing clinical programs. *See* Ex. 17 at JNJ351935, 37.

37. Once the program, or initiative, had been developed, the Regional Clinical Officers conferred with their assistants, such as CW1, who were responsible for searching Omnicare's patient database to identify and locate target patients and compile data about each patient's attending/prescribing physician, the LTCF in which they reside and the patient's family and medical information. Gruber would contact CW1 to compile this information. After the data was compiled, Omnicare prepared and sent "therapeutic interchange letters" to physicians, LTCFs, and/or their families, recommending the target-drug and asserting that it was in the patient's best interest to make the switch. According to CW1, the tone and content of the letters was often adapted to the recipient. For instance, a letter to family might state, "grandma would only have to take one pill instead of two," while the letters to the LTCF would focus on cost savings, and those to physicians might focus on the efficacy of the drug, with the intent of making it easy for the doctor to say yes to the substitution.[10] Kammerer

[10] CW1 stated that at the time of CW1's departure, Omnicare was in the process of developing a single letter that could be mass

corroborated this information, stating that Omnicare would advise its pharmacists and physicians that, for example, drug A had the same or even better efficacy than drug B, but drug A would save the payor money and decrease Omnicare's costs, when in fact it was not true. Ex. 1 at ¶¶56, 59. These clinical case studies and therapeutic interchange letters were created by Omnicare for the sole purpose of obtaining higher profit margins and were not accompanied by any independent or valid clinical support for the recommendation. According to CW1, physicians had a high volume of patients and did not have time to perform analyses of different drugs themselves.

38. According to Kammerer and CW1, therapeutic interchange letters were often utilized in conjunction with authorization forms that would make it easy for the physician to approve the drug-change simply by checking a box or line. Such communications were called Physician Authorization Letters, or "PALs," requesting that the physician authorize the Omnicare pharmacy to make the recommended drug switch. Ex. 18. The PALs, too, would misrepresent the efficacy and/or cost benefits of the target drug. Ex. 1 at ¶57. Bernard Lisitza ("Lisitza"), a licensed pharmacist and supervisor in charge of several pharmacists at Omnicare's Jacobs HealthCare between 1992 and 2001, personally investigated the statements made in PALs concerning the cost benefits of drugs and determined that, contrary to those statements, the cost of the proposed drug or dosage switch resulted in greater cost to the payor than did the initial prescription. Ex. 3 at ¶¶34-35. CW1 said that, once prepared, the

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produced electronically by filling in certain information concerning the specific patient, drug class and particular drug. CW1 was involved directly with the project to create this single form letter.

letters were sent out by "blast fax," *i.e.* a bulk faxing sent to all addressees. At times, Omnicare would even implement the drug switch without physician authorization. Ex. 1 at ¶57.

39. Omnicare engaged in these drug switching practices for numerous drugs, including Ranitidine, Celexa, Fluoxetine and Buspirone. Exs. 16 at 9-10; 19-20.

40. *The Ranitidine Initiative*: According to CW1, Kammerer, and Lisitza, Omnicare took on a major drug-switching initiative with respect to the drug Ranitidine – the generic form of the antacid Zantac and the second-most prescribed drug to LTCF patients. Kammerer, who was responsible for evaluating the profitability of specific initiatives, developed financial spread sheets that demonstrated whether Omnicare's profitability could be increased by switching the form of patients' Ranitidine prescriptions, *i.e.*, from tablets to capsules. Upon determining that switching patients from Ranitidine tablets to capsules would yield greater revenue, Omnicare management approved the drug-switching initiative and directed the appropriate personnel to make the switch. Ex. 16 at 5-6. As early as 2000, Omnicare took advantage of the discrepancy in reimbursement rates by systematically instructing its clerical staff to alter physician orders for Ranitidine from tablets to capsules. Ex. 3 at ¶¶5, 25.

41. According to Lisitza, Omnicare's initiative to switch patients' Ranitidine prescriptions from tablet to capsule form, resulted in receipt of two to four times the revenue (more than $10 million in 2000-2001 alone) than the Company was entitled to receive from Ranitidine sales. *Id.* at ¶¶2-5, 30, 55. The price differential stems from the fact that there is a maximum

reimbursement price, known as the "Federal Upper Limit,"[11] associated with the frequently prescribed tablet. *Id.* The capsules have no corresponding Federal Upper Limit because they are rarely prescribed and are generally only required for individuals who are intubated and require medication dissolved in a solution to be administered through a nasal tube.[12] *Id.* at ¶¶22-23.

42. According to Lisitza, in order to effect the drug form switch, Omnicare reconfigured its computers to make it virtually impossible for data entry clerks to enter any prescription orders for Ranitidine tablets. *Id.* at ¶¶24-27. Upon receiving tablet prescriptions, Omnicare's data entry clerical personnel simply could not process the orders. *Id.* Omnicare would then instruct its clerical personnel to physically alter the prescriptions to make it appear that physicians had prescribed capsules instead of tablets and then enter the false prescription information, requesting capsules instead of tablets, into the order entry system. *Id.*

43. The altered order (from tablets to capsules) was also entered on the patients' Physician Order Sheets, which were required to be verified by physicians on a monthly basis pursuant to state regulations. *Id.* The verifying physicians, however, failed to notice the change from tablet to capsule and would sign off on the Physician Order Sheets, appearing to approve the change. *Id.*

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[11] The Federal Upper Limit was set by the Health Care Financing Administration, now known as the Center for Medicare & Medicaid Services.

[12] Ranitidine capsules and tablets are not considered the same medication under federal and state law. A pharmacy cannot unilaterally switch between one form of Ranitidine and another without a physician's express order.

44. According to Kammerer, the Ranitidine tablet-to-capsule switch was also effected through the use of PALs. Occasionally, the PALs just stated that the form of the prescription would be switched unless the physician actively intervened to stop Omnicare pharmacists from doing so. Ex. 16 at 8-9. Furthermore, when market conditions changed, making the tablet more profitable than the capsule, Omnicare would send a directive to its pharmacies to revert to the initial prescription, or "turn off the PAL." *Id.* at 8. Significantly, according to Kammerer, in most cases, the periodic switches from Ranitidine tablets to Ranitidine capsules were done *without a new physician prescription authorizing the change*. *Id.* at 6.

45. CW1 indicated that during her tenure with the Company, the government began investigating the Ranitidine drug-switching practices at one of the pharmacies in the Midwest Region, prompted by the justifications for the interchange that appeared in the interchange letters. According to CW1, Omnicare's top management viewed the Ranitidine investigation as "big trouble," and an issue that the Corporate Office and Regional Operations were "tight lipped" about.

Omnicare Contractual Arrangements With Pharmaceutical Manufacturers

46. The Registration Statement also contained the following false and misleading statement concerning Omnicare's contractual arrangements with pharmaceutical manufacturers:

> Our contractual relationships with pharmaceutical manufacturers can include rebates and other forms of price concessions on the product we purchase. On November 28, 2005 CMS [Centers for Medicare and Medicaid Services] posted to the

"Questions and Answers" portion of its website a statement to the effect that it has significant concerns about the continued payment of certain rebates by pharmaceutical manufacturers to long-term care pharmacies with respect to prescriptions dispensed under the new Medicare Part D prescription drug benefit, and that it is examining this issue closely. *We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.* However, there can be no assurance that, if these price concessions were no longer provided to us, there would not be a materially adverse effect on our business or results of operations.

The Registration Statement specifically pointed to the Company's obligation to comply with the Federal Anti-Kickback Statute and other laws concerning pharmaceutical marketing programs, stating:

> Referral Restrictions. We have to comply with federal and state laws which govern financial and other arrangements between healthcare providers. These laws include the federal anti-kickback statute, which prohibits, among other things, knowingly and willfully soliciting, receiving, offering or paying any remuneration directly or indirectly in return for or to induce the referral of an individual to a person for the furnishing of any item or service for which payment may be made in whole or in part under federal healthcare programs. . . . Violations of these laws may result in fines, imprisonment, denial of payment for services, and exclusion from the federal programs and/or other state-funded programs.

Other provisions in the Social Security Act and in other federal and state laws authorize the imposition of penalties, including criminal and civil fines and exclusions from participation in Medicare, Medicaid and other federal healthcare programs for false claims, improper billing and other offenses.

In addition, a number of states have undertaken enforcement actions against pharmaceutical manufacturers involving pharmaceutical marketing programs, including programs containing incentives to pharmacists to dispense one particular product rather than another. These enforcement actions arose under state consumer protection laws which generally prohibit false advertising, deceptive trade practices, and the like.

We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws. These laws may, however, be interpreted in the future in a manner inconsistent with our interpretation and application.

47. The statements in ¶46 above, were materially false and misleading when made and failed to disclose the true facts, detailed in ¶¶48-90 below, which demonstrate that, in violation of the Federal Anti-Kickback Statute, Omnicare executed and implemented contracts with pharmaceutical manufacturers whereby the Company promoted and/or increased the market share of manufacturer-specified drugs in exchange for kickbacks. Additionally, the conduct set forth in ¶¶48-90 below, further renders the statements

in ¶27 above, materially false and misleading when made because, pursuant to its contracts with pharmaceutical manufacturers, Omnicare utilized its Pharmacy Consulting Services to: (1) implement therapeutic initiatives designed to increase Omnicare's revenue and profit rather than provide patients with more appropriate, efficacious and/or safer drugs; and (2) promote drugs for off-label use in disregard for patient safety.

48. During the time period covered by the Registration Statement, Omnicare entered into agreements with numerous pharmaceutical manufacturers concerning the promotion and sale of specific drugs. Pursuant to these contracts, pharmaceutical manufacturers induced Omnicare to increase the manufacturer's "market share" of a particular drug, where market share referred to Omnicare's purchases of the drug as a percentage of its total purchases of drugs in the same therapeutic category. The agreements provided for Omnicare's receipt of cash rebates in exchange for increasing the manufacturer's market share for particular drugs. In other words, the pharmaceutical manufacturers paid Omnicare to purchase and/or recommend the manufacturer's drugs over competing products. Omnicare's therapeutic initiatives or interchanges, detailed in ¶¶29-39 above, were the primary vehicle for implementing the contracts.[13]

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[13] Omnicare took these kickbacks into consideration when evaluating the profitability of its clinical initiatives. Ex. 16 at 3. Internal documents reveal that Omnicare would play pharmaceutical manufacturers against one another in an effort to obtain the highest rebate, or greatest profit, possible for pushing drugs in a particular therapeutic category. *See* Ex. 7 at 1 (Dan Maloney, Vice President of Contracting, indicating that insufficient offer by Johnson & Johnson would lead him to seek a contract with Bayer).

49. Omnicare's contracts with drug manufacturers, and the initiatives implemented pursuant thereto, violated the Federal Anti-Kickback Statue. The Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), prohibits any person or entity from soliciting or receiving payment of any kind, "directly or indirectly, overtly or covertly," for arranging for or recommending the purchase of any good, including pharmaceuticals, that will be paid for by Federally funded health care programs:

> (2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person –
>
> * * *
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined no more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b)(2).[14]

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[14] The anti-kickback statute arose out of Congressional concern that payoffs made to those who can directly influence health care decisions (such as pharmaceutical consultants in nursing homes) will result in conduct that harms patients and Federally funded healthcare programs, such as prescription of goods and services that are medically unnecessary, of poor quality, or even harmful to the vulnerable patient population. To protect patients and the integrity of Federal health care programs, including Medicare

50. Violation of the Federal Anti-Kickback Statute subjects the violator to exclusion from participation in Federal health care programs, including Medicaid and Medicare. 42 U.S.C. § 1320a-7(b)(7).[15] Additionally, compliance with federal and state laws, including the Federal Anti-Kickback Statute, is a condition precedent to reimbursement of Medicaid claims under the law of every state, which require Medicaid participants to certify their compliance with state and federal laws and regulations. *See, e.g.*, Fla. Stat. § 409.920(2)(a)(5); 305 ILCS 5/8A-3(b), (c); 130 CMR 450.261.

51. Omnicare's top officers, including defendants Gemunder and Froesel, were intimately involved in negotiations concerning the kickback arrangements and the therapeutic initiatives employed to increase the manufacturer's market share. Exs. 7 at JNJ298613; 16 at 4; 21 at JNJ011363. CW1 verified that it was Omnicare's top management in the Corporate Office that was responsible for negotiating contracts with pharmaceutical manufacturers.

52. Omnicare solicited and received kickbacks from pharmaceutical manufacturers pursuant to various contractual arrangements, including the following:

53. *Johnson & Johnson*: The government charges

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and Medicaid, the anti-kickback statute strictly prohibits the payment of kickbacks or rebates in exchange for promoting or arranging for the purchase of specific pharmaceuticals, even if the drug recommendation or purchase is medically justifiable.

[15] Violation can also result in civil monetary penalties and imprisonment of up to five years per violation. 42 U.S.C. §§ 1320a-7(b)(7), 1320a-7a(a)(7). The civil monetary penalties may be up to $50,000 for each act in violation of the anti-kickback statute and damages of up to three times the amount of the remuneration offered or paid. 42 U.S.C. § 1320a-7(b).

filed against J&J in January 2010 provide the most detailed account of Omnicare's illegal kickback arrangements. Documents produced in connection with the DOJ complaint demonstrate that Omnicare and J&J signed drug supply agreements in 1997 (the "1997 Agreement") and 2000 (the "2000 Agreement") (collectively, "the Agreements") that covered the period between April 1, 1997 and March 31, 2004 and set forth a mechanism by which J&J would pay Omnicare rebates, or kickbacks, for promoting J&J pharmaceuticals in direct violation of the Federal Anti-Kickback Statute. Exs. 8; 10; 22.

54. Pursuant to the Agreements, Omnicare promoted specific J&J pharmaceuticals, known as "strategic products," in an effort to increase their "market share." Exs. 8 at JNJ001084, 92, 100-03; 10 at JNJ001032, 36-39, 41-42. Market share increased when Omnicare's purchases of a J&J-specified drug increased as a percentage of the Company's total purchases of drugs in the same therapeutic category. Exs. 8 at JNJ001092; 10 at JNJ001032. In turn, J&J paid Omnicare quarterly "market share rebates" – or illegal kickbacks – that were tied directly to the market share Omnicare achieved for a particular strategic drug. Exs. 8 at JNJ001100-03; 10 at JNJ001041-42. The quarterly rebate was a performance-driven, tiered rebate incentive in exchange for Omnicare to aggressively push and sell J&J drugs in LTCFs.

55. Omnicare received rebates for increasing the market share of J&J drugs that ranged between 1% and 14% of Omnicare's total purchases of each drug, increasing as the market share for the drug increased. For example, the 2000 Agreement provided for the following, tiered rebate incentive schedule:

Product		Tier 1	Tier 2	Tier 3	Tier 4	Tier 5	Active Intervention Program Requirements
DUTAGERIDS®	Actual Mkt Share Rebate %	55.0% 2.0%	60.0% 4.0%	65.0% 8.0%	70.0% 10.0%		See Below
ACIPHEX™	Actual Mkt Share Rebate %	Transition Period (12 months) 8.0%	<15.0% 8.0%	≥15% to 34% 8.0%	≤25% to 29% 10.0%		See Below
PROPULSID™	Actual Mkt Share Rebate %	Secondary Access 1.5%	20.0% 4.0%	25% 8.0%	30% 10.0%		NONE
LEVAQUIN® TABLETS	Actual Mkt Share Rebate %	Transition Period (6 months) 6.0%	<30% 9.0%	≥30% 15.0%			See Below
LEVAQUIN® IV	Actual Mkt Share Rebate %	Transition Period (12 months) 3.0%	<30% 8.0%	≥30% to 70% 5.0%	>70% 7.0%		See Below
REPREDALE®	Actual Mkt Share Rebate %	Transition Period (6 months) 3.0%	<35% 6.0%	35% to 37% 8.0%	>37% to 42% 9.0%	>42% 11.0%	See Below
ULTRAM®	Actual Mkt Share Rebate %	Secondary Access 1.5%	10.0% 3.0%	15.0% 4.0%	20.0% 6.0%	25.0% 8.0%	See Below
PROCRIT®	Actual Mkt Share Rebate %	Secondary Access 2%					See Below

56. In addition to the quarterly market share rebates, Omnicare accepted "performance" rebates from J&J pursuant to the Agreements that also violated the Federal Anti-Kickback Statute. The 1997 Agreement included a 1% "Annual Strategic Product Performance Rebate" and the 2000 Agreement included a 2% "Annual Product Performance Incentive." Exs. 8 at JNJ001100; 10 at JNJ001035. Under both provisions, J&J paid Omnicare annual performance rebates for implementing an "Active Intervention Program (AIP)" or "Appropriate Use Program (AUP)" for certain drugs. The performance rebates violated the Federal Anti-Kickback Statute because the AIP and AUP programs from which the rebates were derived, were specifically designed to "shift market share" to or "cause the appropriate use" of J&J's strategic drugs, as defined in the Agreements:

> a) "Active Intervention Program" shall mean a program, applied by Manager and accepted by

Supplier[16] in writing, which is *designed to appropriately shift market share to Supplier's Product*. Active interventions can include, but are not limited to, disease management initiatives, written correspondence to Participating Providers prescribing or dispensing pharmaceutical products, educating nursing home staff regarding Supplier's Products, *conducting clinical intervention programs though which consultant pharmacists recommend Supplier's Products when appropriate*.

b) "Appropriate Utilization Program" or "AUP" shall mean a program applied by Manager, and accepted in writing by Supplier, *designed to [illegible] the appropriate use of Supplier's Product(s)*.

Exs. 8 at JNJ001084, 89; 10 at JNJ001031.

57. Omnicare and J&J jointly developed the AIP/AUP "initiatives" which were intended to increase physicians' prescriptions and thus Omnicare's purchases of J&J drugs. Ex. 10 at JNJ001036. Pursuant to the AIP or AUP, Omnicare and J&J designated certain drugs as "Selected," meaning Omnicare and its pharmacy consultants "favored" those drugs over other brands for certain clinical indications. *Id.* at JNJ001043. In order to promote and increase the market share of Selected drugs, Omnicare personnel "actively participate[d] in educational and promotional programs discussing [the Selected drugs]" and "work[ed] with [J&J] to implement communication effort to inform attending physicians of" a drug's "favored" status. *Id.* Omnicare even developed scripts to enable its pharmacists to recommend the J&J

[16] "Manager" refers to Omnicare and "Supplier" refers to J&J. Exs. 8 at JNJ001085; 10 at JNJ001028 (footnote added).

products. Ex. 23 at OMNI-MA881954-57. Omnicare and J&J met quarterly to discuss the "performance goals" and "progress on the business plan." Ex. 10 at JNJ001036.

58. In addition to the aforementioned "overt" kickbacks, Omnicare also received "covert" kickbacks designed to circumvent the law. For instance, Omnicare and J&J characterized certain kickbacks as "data fees" or "grants." The kickbacks were generated as a result of Omnicare's and J&J's contractual arrangements, and Omnicare's successful promotion and sale of targeted J&J drugs, but were re-characterized as "data fees" or "grants" to disguise their true purpose.

59. The re-characterization was prompted by J&J's concern that the kickbacks would set a new "Best Price" for drugs under the Medicaid Drug Rebate Statute, 42 U.S.C. § 1296r-8. Under the Medicaid Drug Rebate Statute, pharmaceutical manufacturers are required to advise Medicaid of the "Best Price" associated with a particular drug and pay rebates to Medicaid that increase as the Best Price decreases.[17]

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[17] Congress enacted the Medicaid Drug Rebate statute, 42 U.S.C. § 1396r-8, to ensure that the Medicaid program would receive the benefit of the same discounts and prices on drugs that other large public and private purchasers enjoyed. *See* H.R. Rep. No. 101-881, at 986 (1990), *reprinted in* 1990 U.S.C.A.A.N. 2017, 2108. Under the Medicaid Drug Rebate Statute, in order for a brand name drug to be covered and reimbursed by the Medicaid program, its manufacturer has two primary obligations. First, the manufacturer must report on a quarterly basis to the Secretary of HHS the drug's "average manufacturer price" and the "best price" offered for that drug. 42 U.S.C. § 1396r-8(b)(3)(A). Second, the manufacturer must pay each state a quarterly rebate equal to the total number of drug units (*e.g.*, pills) purchased by the state times the greater of (1) 15.1% of the drug's average manufacturer price, or (2) the difference between the average

By disguising the kickbacks as "data fees" and "grants," Omnicare and J&J sought to evade Best Price detection in violation of the Medicaid Drug Rebate Statute.

60. In an attempt to create an air of legitimacy, J&J and Omnicare entered into a "Consulting and Services Agreement," covering the period between July 1, 2000 and April 1, 2004, that set forth terms under which J&J would appear to pay Omnicare for data. Ex. 24. J&J and Omnicare agreed that any rebates that would have been received as a result of the promotion and increased market share of J&J drugs, would instead be distributed in the form of "data fees," purportedly for Omnicare's furnishing J&J with market share reports for J&J drugs as well as data identifying physicians who prescribe competing drugs rather than J&J drugs. Ex. 25. Notably, prior to entering into the consulting agreement, Omnicare had been providing this same data to J&J free of charge, underscoring the disingenuousness of the "data fees" and elucidating their true nature as kickbacks.

61. An internal memorandum further exposes the illicit nature of the agreement and demonstrates that Omnicare and J&J entered into the agreement solely to circumvent the law:

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manufacturer price and the best price. 42 U.S.C. § 1396r-8(c)(1)(A). In other words, J&J was required to pay at least a 15.1% rebate to each state on all of its drug sales for Medicaid patients, but J&J would have to pay a higher Medicaid rebate on all of those sales if it offered any single customer, *e.g.*, Omnicare, a total discount that exceeded 15.1 %. Under the Medicaid Drug Rebate Statute, 42 U.S.C. § 1396r-8, drug manufacturers like J&J are supposed to file quarterly reports showing that Medicaid programs got the same rebates as other big purchasers.

1. Consulting and Services Agreement

   a. Risperdal Rebates have been pushing towards Best Price

   b. To avoid Best Price, the Strategic Overlay for Risperdal (2% of sales) had to be eliminated

   c. In order to balance this, an agreement was established with Omnicare to purchase data, roughly at the cost of the Strategic Overlay for Risperdal

Ex. 26. In a similar fashion, Omnicare and J&J amended the 2000 Agreement to ensure that Omnicare's "overt" kickbacks would not reduce the current Best Price for a given drug. The amendment stated:

> If at any time during the term of this Agreement the Manager is eligible to receive a discount or rebate, directly or indirectly, for any Product under any contract with Supplier, the combined total of such discount(s) and/or rebate(s) shall be reduced to the extent necessary *so that it does not create a new Medicaid "best price"* for any Product. In the event the combined total of such discount(s) and or rebate(s) would create a new "best price," a price adjustment shall be made.

Exs. 27 at JNJ002618; 25.

62. Pursuant to the "Consulting and Services Agreement," Omnicare received $4,650,000 between 3Q00 and 1Q04. Ex. 24.[18]

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[18] Pursuant to the "consulting" agreement, Omnicare and J&J agreed to mischaracterize the rebates as "data fees" from the fourth quarter of 1998, the first quarter of 1999 and the additional rebates from the two percent Annual Produce Performance Incentive (also referred to as a "strategic overlay" for

63. The Consulting and Services Agreement violated the Medicaid Drug Rebate Statute by concealing the true "Best Price" for J&J drugs.

64. Omnicare and J&J also sought to disguise kickbacks paid pursuant to an agreement concerning the J&J drug Sporanox. Omnicare had increased Sporanox's market share enough to justify a rebate of 25%, setting a new "best price," under the statute. In order to avoid "Best Price" detection, J&J sought to decrease the contractual rebate to 20% and "make up" for the 5% rebate loss "in another way." In a July 22, 2002 e-mail, J&J noted:

> We were looking at the cost impact of the Omnicare Sporanox purchases on Janssen business. Since the 25% rebate on Omnicare Sporanox purchases sets the best price, and the next best price is 20%, the Medicaid cost impact is about $1 million per year (avg $200k per % point) for the additional 5%. It may make sense for us approach Omnicare about reducing the rebate to 20%.
>
> * * *
>
> I would recommend to try to make up the loss of rebates in another way.

Ex. 28 at JNJ347031-32. The same e-mail indicated that after speaking with Omnicare, Omnicare was open to switching the rebate payment but "[t]hey did not have a good idea of where to switch the $4,000 payment to." *Id.* at JNJ347032

Risperdal that J&J was required to pay under the 2000 Agreement. The same document also reflects that J&J sent $2.5 million in advance of the regular rebate schedule its 2Q00 rebates in order to assist Omnicare with cash flow issues. *Id.*; Ex. 27 at JNJ002618.

65. Omnicare and J&J further disguised the kickbacks to Omnicare by characterizing them as "grants," "educational funding," and "meeting sponsorship" fees. An internal J&J memorandum indicated that it had paid Omnicare over $1,000,000 for "educational, pull-through, and social activities," over a two-year period. Ex. 11 at JNJ301391. Indeed, Omnicare's high-level executives would directly request such "educational" funding and specifically note that the funding was to support initiatives to increase the market share of certain drugs. Ex. 29.

66. In order to effect its agreements with pharmaceutical manufacturers, Omnicare implemented therapeutic initiatives, as described in ¶¶29-39 above. Welford, Director of Clinical Operations, indicated that among the Company's most important initiatives were the Risperdal Initiative and the Levaquin Initiative. Ex. 30 at JNJ291258.

67. *The Risperdal Initiative*: Pursuant to the drug supply Agreements between Omnicare and J&J, Omnicare initiated an aggressive campaign known as the "Risperdal Initiative," in which Omnicare directed its Regional Clinical Directors and Consultant Coordinators to push Risperdal on patients in nursing homes beginning in 1997. Exs. 9; 29. Omnicare was incentivized to increase Risperdal's market share because the Company could receive rebates up to 11% for driving the drug's market share above 42%. According to Welford, Risperdal was Omnicare's "primary intervention." Ex. 30 at JNJ291258. In order to effect the campaign, Omnicare developed a Patient Specific Therapeutic Interchange Protocol, that purported to provide a medical review of Risperdal justifying the drug's recommendation. Exs. 9; 29.

68. Omnicare's Risperdal Initiative not only violated the Federal Anti-Kickback Statute, but also assisted J&J in violating federal regulations concerning off-label marketing, including the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, which prohibits drug manufacturers from marketing drugs for indications other than those approved by the U.S. Food and Drug Administration ("FDA"), and the FDA Modernization Act of 1997, which bars drug manufacturers from supplying medical practitioners with off-label information unless such information is specifically solicited by the physician. 21 U.S.C. § 260aaa-6.

69. Risperdal is an atypical antipsychotic medication that, at the time of the Offering, had only been approved by the FDA for the treatment of schizophrenia. Risperdal has never been approved to treat patients with dementia and dementia-related behavioral issues. Moreover, the drug was shown to increase the risk of stroke and other cerebrovascular attacks in such patients and even resulted in fatalities among dementia patients. *See* Ex. 31. Regardless, because only 1% of the elderly population has schizophrenia, Omnicare and J&J implemented an initiative to promote Risperdal sales to patients suffering from other indications, *including dementia*, endangering LTCF patients and violating the FDA regulations. Accordingly, the Patient Specific Therapeutic Interchange Protocol drafted to support the initiative was specifically revised to add "much more emphasis on geriatric behavior use and decreased [sic] the emphasis on schizophrenia." Ex. 9 at OMNI-MA05232. This protocol sought to justify Omnicare's use of Risperdal to promote and sell the drug to patients with behavioral disturbances associated with dementia – an indication for which Risperdal was not approved. *Id.*

70. According to an internal Omnicare memorandum, as part of its Risperdal Initiative, Omnicare engaged in a "Risperdal Fax Campaign" whereby the Company identified LTCF patients taking conventional antipsychotic drugs and faxed, mailed, or telephoned the physician to recommend a switch to Risperdal therapy. Ex. 32 at OMNI-MA766303. According to the memo, the "interchange" was successful and a "significant number of physicians agreed to the conversion." *Id.* For those physicians who did not automatically convert their patients to Risperdal, Omnicare admonished:

> There must continue to be ongoing communication between consultant pharmacists and those physicians who agreed to re-evaluate. Consultants should . . . be armed with the appropriate clinical information. . . . It is imperative that each and every resident on a conventional antipsychotic be re-evaluated for appropriate conversion to an atypical antipsychotic, with Risperdal being the more cost effective GPCG "preferred" alternative.

Id. at OMNI-MA766303-04. Omnicare further directed its pharmacy consultants to continue to evaluate patients who had not been included in the fax campaign for conversion to Risperdal. *Id.*

71. Omnicare also implemented the Risperdal initiative by issuing PALs, which requested that the physician pre-authorize pharmacists to substitute Risperdal over a competitor drug when the pharmacist received the prescription. Ex. 18. For example, Omnicare pharmacies Jacobs Healthcare and Lawrence Weber, collectively serving almost 30,000 beds, began sending PALs to generate pre-authorized approval of Risperdal in May 2001. Ex. 33 at JNJ289772.

72. *The Levaquin Initiative*: Another one of Omnicare's "primary interventions" was the "Levaquin Initiative," designed to promote the J&J drug and increase its market share with respect to its number one competitor, Cipro. Ex. 30. Cipro, a Bayer Pharmaceutical drug, had long been the drug of choice in the antibiotic therapeutic category, with over 70% market share. Through the Levaquin Initiative, whereby Omnicare and its pharmacy consultants actively favored Levaquin over Cipro and other brand named drugs in the same category, Omnicare was able to increase the market share for Levaquin from 19.2% in 4Q98 to 66.4% in 2Q01, reducing Cipro from approximately 80% to 28% market share over the same timeframe. Ex. 7. By October 2001, Levaquin surpassed Cipro, reaching over 71% market share. *Id.* To achieve these results, Omnicare sent PALs, or therapeutic interchange letters, to physicians asking for their approval to switch patients to Levaquin. Exs. 33-34. When physicians did not respond, Omnicare pharmacists called physicians, upon receipt of a prescription for Cipro, and requested the conversion to Levaquin. Ex. 33-34.[19]

73. *The Success of Omnicare's Interchange Programs*: The success of Omnicare's initiatives was unprecedented, generating greater market share for the pharmaceutical manufacturers and generous

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[19] Omnicare's initiatives were not limited to Risperdal and Levaquin alone. It's contractual arrangements with J&J specified that the Company would receive kickbacks for promoting other drugs as well. Exs. 8; 10. Omnicare's initiatives to promote these drugs were successful as well. For example, J&J commended Omnicare for its success in shifting market share to other drugs, such as Ultram, noting that Omnicare had "been able to switch . . . prescriptions to Ultram." Ex. 35.

kickbacks for the Company. In a PowerPoint presentation in 2000, J&J commended Omnicare for the success of both the Risperdal and Levaquin Initiatives:

> 1999 Accomplishments
>
> • Completed "Risperdal Re-ignition Program" – Generating over a 50% market share.
>
> * * *
>
> • Developed Programs for Consultant Pharmacists in Dealing with Obstacles and Overcoming Resistance in Physician Prescribing Habits toward Risperdal.
>
> * * *
>
> • Levaquin over 50% Market Share. Ex. 36 at OMP004128, 31-32.

74. In another e-mail, J&J again lauded the Company's efforts and success: "Omnicare is the example of what Johnson & Johnson believes to be the gold standard of Pharmacy Providers" based on its stellar performance increasing "Risperdal market share in an extremely competitive market." Ex. 35. An undated internal memorandum summarizes the success of Omnicare's and J&J's undisclosed, profit-driven relationship:

> During 1997, The Johnson & Johnson Long Term Care Business Group along with Johnson and Johnson Health Care Systems signed a performance based contract with Omnicare, Inc. The contract provided for a performance driven tiered rebate to be implemented for Johnson & Johnson strategic brand pharmaceutical products including Ultram, Duragesic, Propulsid, Procrit, Risperdal, Levaquin, and Floxin.

Currently, Omnicare is running two initiatives for products produced at Janssen and Ortho-McNeil. Risperdal has generated an all time market share high of 55.5% throughout the 1st quarter of 2000. This market share represents Omnicare's ability in persuading physicians to write Risperdal in the areas of Behavioral Disturbances associated with Dementia.

Omnicare also has an initiative under way for the antibiotic Levaquin for Urinary Tract Infections and Community Acquired Pneumonia. *At the end of the first quarter, Levaquin reached an all time high market share of 67.02%. Once again, demonstrating Omnicare's ability to persuade* physicians to write the most efficacious medication based on clinical evidence.

The partnership has grown beyond product interventions. Omnicare's Clinical Research Organizations have been involved with past clinical studies and offers potential in a geriatric specific environment for products such as Reminyl.

Janssen and Omnicare have also piloted an e-commerce initiative that would demonstrate *Omnicare's abilities in persuading physicians to write medications in a less structured assisted care living environment.* There are also meetings currently underway that would look at a partnership approach in the European sector, in addressing the same type of product interventions with Janssen Cilag in England.

Omnicare, Inc. has demonstrated its ability to partner in a true sense of the word and has generated well over 100 million dollars of Johnson & Johnson pharmaceuticals annually.

75. Omnicare and its pharmacy consultants had unbelievable power to influence patients' drug prescriptions. As J&J observed in an internal memorandum from 2003:

> Omnicare has over 900 consultant pharmacists who review patient charts monthly and make recommendations based on the formulary and Omnicare programs for physicians. *Pharmacists' recommendations are accepted more than 80% of the time.* Consultant pharmacists actively meet with physicians or correspond with them through the mail to obtain approval to make appropriate medication switches for all their applicable nursing home patients. . . . Omnicare consultant pharmacists receive monthly "report cards" showing them their success in obtaining goals for therapeutic programs.

Ex. 17 at JNJ351928. In the same memorandum, J&J observed that Omnicare's "consultant pharmacists are active in having physicians sign therapeutic interchange forms that allow pharmacists to review charts and make switches without having to consult with the physician." *Id.* at JNJ351940. J&J further understood that consultant pharmacists had a "[h]igh degree of impact on product selection" in nursing homes. Ex. 14 at JNJ284630.

76. Omnicare's pharmacy consultants were so effective at promoting and inducing the sale of targeted pharmaceuticals that it caused one J&J executive to comment, "Incredible: good for us but scary on the power to do this." Ex. 38. Indeed, J&J considered Omnicare's consultants an "Extension of [the J&J] Sales Force." Ex. 39 at JNJ289731.

77. The kickback arrangements between Omnicare and J&J were lucrative for both companies. Between 1999 and 2004, Omnicare's annual purchases of J&J drugs nearly tripled to almost $300 million, with annual purchases of Risperdal alone rising to over $100 million. J&J determined that, "for a $3MM investment in rebates with Omnicare, [J&J] gain[s] $9MM in sales, less costs and investments, returns $4.8MM to OMP." Ex. 40 at JNJ351497. In another internal J&J e-mail, J&J bragged about the success of the kickback scheme between Omnicare and J&J, noting that for every a $1.44 million in "investment in rebates" with Omnicare, J&J gained $9 million in sales. *Id.*

78. In total, Omnicare obtained many millions of dollars in rebates from J&J. During 4Q01, the Company also specifically obtained: a 8% rebate for Duragesic purchases, totaling $2,282,609; a 5% rebate for purchases of Ultram, totaling $326,003; a 14% rebate for Ditropan XL purchases, totaling $866,096; a 2% rebate on Topamax purchases, totaling $98,640; a 7% rebate on Reminyl purchases, totaling $231,897; a 2% rebate on Aciphex purchases, totaling $51,956; and a 2% rebate on Regranex purchases, totaling $50,212. Ex. 1 at ¶46.

79. *Abbott Laboratories*: In 4Q01, and in other calendar quarters, Abbott Laboratories ("Abbott Labs") paid Omnicare concealed "discounts" to induce Omnicare to make purchases of Abbott Labs' products and in exchange for Omnicare agreeing to give preferential treatment to these drugs over competitors' drugs. Omnicare ultimately received a 6.0% discount on its total purchases of Flomax and an 88% discount on purchases of K-Tab for taking steps to increase the market share of these drugs. Omnicare's

rebates for Flomax and K-Tab totaled $269,700 and $3,490,539, respectively, under this specific agreement. *Id.* at ¶42.

80. *AstraZeneca Pharmaceuticals*: In April 2000, Omnicare entered into an agreement with AstraZeneca Pharmaceuticals ("AstraZeneca") intended to increase the market share of certain AstraZeneca drugs. The agreement was described as "highly confidential," and provided for Omnicare to receive rebates of up to 13% depending on the market share Omnicare achieved for the drug Seroquel®. Pursuant to the agreement, Omnicare received a 2% rebate for achieving market share greater than 5%, a 5% rebate for market share greater than 10%, and 13% for market share greater than 40%. In addition, Omnicare received a 1% rebate in exchange for positioning Seroquel as the "Preferred First Line Atypical Anti-Psychotic." Omnicare and AstraZeneca entered into similar agreements regarding other drugs, such as Zestril and Nolvadex, during other calendar quarters. In 4Q01, these contractual rebates amounted to $2,985,985 for Seroquel, $9,794,130 for Zestril, and $419,657 for Nolvadex. *Id.* at ¶43.

81. *Bayer Corporation*: In 4Q01, Bayer Corporation ("Bayer") paid Omnicare rebates totaling $1,576,116 for increasing market share and providing other preferential treatment for Bayer drug Adalat CC. Omnicare had other agreements with Bayer to increase market share of Bayer drugs, including an agreement in 1999 whereby Bayer agreed to and did pay Omnicare a 4% rebate for market share between 2% and 5%; 8% rebate for market share between 5.1% and 10%; and a 27% rebate for market share of 30.1% or higher for the drug Baycol. *Id.* at ¶44.

82. *Eli Lilly & Co.*: Omnicare and Eli Lilly & Co. ("Eli Lilly") entered into an agreement concerning the drug Zyprexa, whereby Omnicare agreed to grant preferential treatment to Zyprexa over competing drugs, and Eli Lilly paid Omnicare a 9.5% rebate totaling $9,874,262, for increasing Zyprexa's market share. Omnicare and Eli Lilly entered into similar arrangements for Zyprexa and other drugs during other calendar quarters. *Id.* at ¶45.

83. *Merck & Co., Inc.*: In 1999, Merck & Co., Inc. ("Merck") entered into an agreement to pay Omnicare rebates ranging from 5% to 28% of its purchases of Prinivil, Vasotec, Prinzide, Mevacor, Zocor, Tim-XE, Cozaar, Hyzaar and Fosamax, in exchange for Omnicare's increasing the market share of the aforementioned drugs and promising not to engage in any programs or initiatives that would divert sales of these drugs. In exchange for increasing the market share of these drugs, Merck paid Omnicare a quarterly check for the total sum of rebates owed. Omnicare entered into similar agreements with Merck in other years as well. *Id.* at ¶47.

84. *Novartis*: During 4Q01 and in other quarters, Omnicare accepted rebates from Novartis for granting preferential treatment to Novartis drugs, Miacalcin, Exelon, Clozaril and Trileptal. In exchange for increasing the market share of these drugs, Omnicare received an 8% rebate on Miacalcin purchases for a total of $1,068,955; a 15% rebate on Exelon for a total of $1,509,117; a 13% rebate on Clozaril for a total of $1,035,489; and a 1.1% rebate on Trileptal for a total of $38,142. *Id.* at ¶48.

85. *Novo Nordisk*: In 4Q01, Omnicare received concealed discounts from Novo Nordisk totaling

$6,284,874, in exchange for Omnicare's granting preferential treatment for certain drugs manufactured by Novo Nordisk. Specifically, Omnicare received a 53.2% rebate amounting to: (a) $2,223,211 for purchases of Novolin N®; (b) $2,113,554 for purchases of Novolin 70/30®; and (c) $1,948,109 for purchases of Novolin R1®. *Id.* at ¶49.

86. *Pharmacia*: Omnicare entered into contracts with Pharmacia whereby Omnicare received rebates for increasing the market share of, and granting preferential treatment to, Pharmacia drugs. For example, in 4Q01, Pharmacia received the following rebates for pushing market share to Pharmacia drugs: (a) 15%, or $4,074,093, on purchases of Celebrex, (b) 12%, or $838,171, on purchases of Ambien®; (c) 13%, or $826,022, on purchases of Detrol®; (d) 6%, or $292,892, on purchases of Xalatan®; (e) 4%, or $92,598, on purchases of Mirapex®; (f) 2%, or $36,588, on purchases of Zyvox®; and (g) 11%, or $244,587, on purchases of Fragmin®. *Id.* at ¶50.

87. *Ivax*: Ivax Pharmaceuticals, Inc. ("Ivax") is a private company based in Miami, Florida that manufactures generic drugs. In 1998 and 1999, Omnicare officers Dan Maloney ("Maloney") (Director of Purchasing) and Bien approached Ivax to encourage the drug manufacturer to launch generic forms of drugs with patents soon to expire. Ex. 41 at ¶¶14-15.[20] In an effort to encourage Ivax to launch the generic forms, Bien and Maloney advised Kim West, Ivax's Vice President of Sales & Marketing, that Omnicare would utilize "Therapeutic Interchange Programs" to

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[20] *United States of America, et al., ex rel. Kammerer v. Omnicare, Inc. and Ivax Pharms., Inc.*, No. 05-cv-11519-RGS (D. Mass. Mar. 4, 2009).

encourage physicians to utilize Ivax's generic drugs. *Id.* at ¶¶15-16. In a letter dated May 24, 1999, Maloney provided specific examples of the drugs Omnicare could push, including a generic forms of Prozac, the popular antidepressant. *Id.* at ¶16.

88. By mid-1999, Ivax and Omnicare reached an agreement, pursuant to which Ivax paid Omnicare an $8 million "signing bonus" and a 5% post-purchase rebate in exchange for Omnicare's commitment to purchase $50 million worth of the generic drugs fluoxetine (Prozac), omeprazole (Prilosec), famotidine (Pepcid), buspirone (Buspar), terazosin (Hytrin), and enalapril (Vasotec), exclusively from Ivax between January 1, 2000 and December 31, 2002. *Id.* at ¶¶17, 22-26, 35.

89. Omnicare pursued this agreement despite having sought the advice of an Attorney who gave the Company a stringent warning about the appropriateness of the contract. In a 15-page memorandum dated June 7, 1999, the attorney warned that the contract with Ivax

> carries a *heightened* risk that a federal or state prosecutor would determine it violates federal or state fraud abuse statutes, specifically the federal anti-kickback statute . . . the proposed arrangement, on its face, has all the characteristics of a kickback. It involves a lump-sum cash payment (the stated "signing bonus") intended as an incentive to win Omnicare's business.

Id. at ¶20 (emphasis in original).

90. Omnicare's top executives, including defendant Gemunder, were well aware of the legal implications. Bien had specifically advised Gemunder and others that the signing bonus had triggered a red flag with

the legal department. *Id.* at ¶31. In an effort to obtain a green light, Omnicare then consulted with a different attorney, but failed to advise the attorney about the "signing bonus," and the fact that a portion of the bonus would be received before Omnicare purchased any of Ivax's products. *Id.* at ¶¶32-33. Omnicare and Ivax executed the deal on December 21, 1999, but backdated the contract to April 1, 1999 to enable Omnicare to record revenue over three quarters in 1999. *Id.* at ¶¶34-35.

Legal Compliance

91. The Registration Statement falsely advised investors that Omnicare conducted its business, and its Pharmacy Services business in particular, in a lawful and ethical manner. The Registration Statement described that Omnicare provided Consultant Pharmacist Services pursuant to federal and state mandates that require LTCFs to retain consultant pharmacists in order to improve resident care:

> Federal and state regulations mandate that long-term care facilities, in addition to providing a source of pharmaceuticals, retain consultant pharmacist services *to monitor and report on prescription drug therapy in order to maintain and improve the quality of resident care.* The Omnibus Budget Reconciliation Act ("OBRA") implemented in 1990 sought to further upgrade and standardize care by setting forth more stringent standards relating to planning, monitoring and reporting on the progress of prescription drug therapy, as well as overall drug usage. *We provide consultant pharmacist services, which help clients comply with the federal and state regulations applicable to nursing homes.* The services offered by our consultant pharmacists include:

* * *

- *assistance to the nursing facility in complying with state and federal regulations as they pertain to drug use* [Form 10-K, 2004, at 5, incorporated by the Prospectus at S-36].

92. The statements in ¶91 above, were materially false and misleading when made because defendants failed to disclose the true facts, detailed in ¶¶93-99, below, which demonstrate that Omnicare: (1) did not assist LTCFs in complying with OBRA; (2) violated the Federal Anti-Kickback Statute; (3) assisted pharmaceutical manufacturers in promoting drugs for off-label use in violation of the Food, Drug and Cosmetic Act; (4) assisted pharmaceutical manufacturers in evading "Best Price" detection, in violation of the Medicaid Drug Rebate Statue; and (5) violated the False Claims Act. These practices were both unethical and illegal, rendering defendants' statements false and misleading.

93. *The Federal Anti-Kickback Statue*: As detailed in ¶¶48-90 above, during the relevant time period Omnicare entered into contractual arrangements with pharmaceutical manufacturers, whereby the Company agreed to promote and increase the market share of manufacturers' drugs in violation of the Federal Anti-Kickback Statute. In order to promote and increase market share of the pharmaceutical manufacturers' drugs, Omnicare utilized its extensive network of pharmacy consultants that provided on-site services in LTCFs. Omnicare, as the nation's largest provider of pharmacy consulting services to nursing homes, was able to offer services to LTCFs at below-market rates in exchange for their agreement to contract with Omnicare to provide drug procurement, distribution and billing services. Ex. 2 at ¶20. Once

in the nursing homes, Omnicare essentially used its pharmacy consultants to channel nursing home patients to drugs chosen by Omnicare, drugs that increased the Company's revenue or profit because of the drug's reimbursement rate or kickbacks arrangements with manufacturers. Omnicare's discounted pharmacy consulting services equated to payment to LTCFs in exchange for the right to promote the drugs of its choice, in further violation of the Anti-Kickback Statute.[21]

94. *The Food, Drug and Cosmetic Act*: As detailed in ¶¶67-71 above, Omnicare assisted J&J in the off-label promotion of Risperdal for treatment of elderly patients with dementia, in violation of the Food, Drug and Cosmetic Act ("FDCA"). "Off-label use" refers to use of a drug to treat conditions that have not been clinically evaluated and approved by the FDA. Accordingly, off-label use of pharmaceuticals subjects a patient to drugs that have not been determined safe and effective to treat their conditions. Although the FDA rejected Risperdal to treat elderly patients with dementia, the Company embarked on a massive initiative to drive Risperdal sales among the captive, elderly population in LTCFs suffering from dementia, for the sole purpose of increasing prescriptions and reaping greater revenue and profit. Omnicare's off-label promotion of Risperdal was linked to increased incidence of cerebrovascular adverse events, including stroke and even death. Ex. 31.

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[21] The Office of the Inspector General in its Supplemental Compliance Program Guidance for Nursing Facilities, 73 Fed. Reg. 56832 (Sept. 30, 2008), reaffirmed that provision of services at below cost or below fair market value that is tied, directly or indirectly, to Federal health care program business. *Id.* at 56844. Although issued in 2008, the Supplement did not create "new law," but rather provided details concerning liability under existing laws and regulations. *Id.* at 56836.

95. *Medicaid Drug Rebate Statute*: As detailed in ¶¶58-65 above, Omnicare assisted pharmaceutical manufacturers in violating the Medicaid Drug Rebate Statute by failing to disclose the contractual rebates that Omnicare received from the manufacturers. The Medicaid Drug Rebate Statute requires pharmaceutical manufacturers to advise Medicaid of the Best Price at which it offers its pharmaceuticals. By failing to report rebates and entering into contractual arrangements to evade Best Price detection, Omnicare assisted pharmaceutical manufacturers in violating the law.

96. *The False Claims Act*: As a result of Omnicare's (1) drug-switching practices (¶¶29-45 above), (2) kickback arrangements with pharmaceutical manufacturers (¶¶48-90 above), and (3) off-label marketing of pharmaceuticals (¶¶67-71 above), the Company sought and received reimbursements from Medicaid and Medicare that the Company was not entitled to receive. These practices violated the False Claims Act which prohibits anyone from:

> (a) knowingly presenting a false claim for payment to Medicaid or Medicare (among other government agencies);
>
> (b knowingly making, using, or causing to be made or used, a false record or statement material to a false claim; or
>
> (c) conspiring to defraud the Government by getting a false claim allowed or paid.

31 U.S.C. § 3729. Liability under the False Claims Act subjects the violator to civil penalties equivalent to 3 times the amount of damages sustained by the Government plus an additional penalty between $5,000-$10,000.

97. Because Omnicare: (1) failed to comply with state and federal laws and regulations; (2) provided false information to physicians in order to persuade them to write prescriptions for drugs that would not otherwise have been prescribed; and (3) changed patients prescriptions without physician authorization, the Company violated the False Claims Act and received millions of dollars in reimbursements from Medicaid and Medicare that it was not entitled to receive.

98. *OBRA*: Omnicare's pharmacy consulting practices also violated the Federal Nursing Home Reform Act, or OBRA '87, which requires each nursing home to "employ or obtain the services of a licensed pharmacist who . . . [p]rovides consultation on all aspects of the provision of pharmacy services in the facility." 42 C.F.R. § 483.60(b). OBRA further requires that:

> (1) The drug regimen of each resident must be reviewed at least once a month by a licensed pharmacist.
>
> (2) The pharmacist must report any irregularities to the attending physician and the director of nursing, and these reports must be acted upon.

42 C.F.R. § 483.60(c).

99. The OBRA requirements are intended to enable LTCF residents to "attain or maintain [their] highest practicable physical, mental, and psychosocial well-being." 42 C.F.R. § 483.25. However, Omnicare violated OBRA by entering into illegal contracts with pharmaceutical manufacturers to increase the market share of certain drugs and by utilizing its consultant pharmacists to implement therapeutic initiatives to benefit drug manufacturers by pushing unapproved

high-profit drugs on LTCF patients. *See* ¶¶29-45, 48-90 above. As a result, Omnicare's consultant pharmacists essentially became part of the drug manufacturers' sales forces and no longer were caregivers dedicated to the best interests of the nursing home patients as required by Congress under OBRA.

OMNICARE'S CONDUCT RENDERED THE FINANCIAL STATEMENTS IN THE REGISTRATION STATEMENT FALSE AND MISLEADING

100. Unbeknownst to investors, Omnicare's financial statements presented in the Registration Statement were materially false and misleading. As described in ¶¶28-45, 48-90 above, Omnicare routinely: (1) engaged in drug-switching practices whereby the Company provided false information to physicians, LTCFs, and others, in order to encourage physicians to prescribe more profitable drugs; (2) switched patients' prescriptions to more profitable drugs even without physician authorization; (3) entered into arrangements whereby it received inducements, or kickbacks, from pharmaceutical manufacturers in exchange for promoting drugs sold by those manufacturers; and (4) boosted sales of certain manufacturers' drugs by engaging in off-label marketing. Additionally, as set forth below, Omnicare paid kickbacks to LTCFs in order to secure pharmacy services contracts pursuant to which the Company implemented its illicit initiatives. These practices caused the Company to submit false claims to Medicaid and Medicare in violation of the False Claims Act and receive and record millions of dollars in revenue to which it was not entitled.

Omnicare Improperly Recognized Revenue from Medicaid Reimbursements for Drugs Purchased from Johnson & Johnson

101. Unbeknownst to investors, Omnicare's financial statements presented in the Prospectus were materially false and misleading and in violation of the Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2), and the False Claims Act, 31 U.S.C. § 3730(h). J&J paid kickbacks to Omnicare to induce the Company to purchase, order, or recommend or arrange for the purchasing or ordering of J&J drugs. As a result, Omnicare violated the Federal Anti-Kickback Statute and all of the reimbursement claims that Omnicare presented to Medicaid for those J&J drugs were false. Omnicare also violated the False Claims Act, and, consequently, the U.S. government was entitled to reclaim those reimbursements that Omnicare improperly recognized as revenue in connection with the Company's submission of false reimbursement claims to Medicaid programs.

102. Omnicare booked the following approximate revenues in connection with its Medicaid reimbursements for drugs purchased from J&J during the period 2000 through 2004: $79.8 million in 2000, $98.1 million in 2001, $120.6 million in 2002, $148.2 million in 2003, and $182.1 million in 2004. Omnicare's financial statements for the fiscal years ended 2000 through 2004 were inaccurate because all of the amounts that the Company booked as revenues in connection with its Medicaid reimbursement requests for the drugs purchased from J&J during those fiscal years were based entirely on false reimbursement claims to Medicaid. As described in ¶¶48-90 above, Omnicare routinely entered into arrangements whereby it received inducements from pharmaceutical

manufacturers to improperly boost the market shares of the drugs sold by those manufacturers. Omnicare's accounting for those false claims inflated the Company's revenues in violation of Generally Accepted Accounting Principles ("GAAP") and SEC guidance.

103. GAAP constitutes those standards recognized by the accounting profession as the conventions, rules and procedures necessary to define accepted accounting practices at a particular time. The SEC has the statutory authority for the promulgation of GAAP for public companies and has delegated that authority to the Financial Accounting Standards Board (the "FASB"). SEC Regulation S-X, 17 C.F.R. § 210.4-01(a)(1), provides that financial statements filed with the SEC that are not presented in conformity with GAAP will be presumed to be misleading, despite footnotes or other disclosures. Regulation S-X, 17 C.F.R. § 210.10-01(a), requires that interim financial statements, such as quarterly financial statements, must also comply with GAAP, with the exception that interim financial statements need not include disclosures that would be duplicative of disclosures accompanying annual financial statements.[22]

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[22] On June 30, 2009, the Financial Accounting Standards Board (FASB) issued Statement of Financial Accounting Standards ("SFAS") No. 168, *The FASB Accounting Standards Codification and the Hierarchy of Generally Accepted Accounting Principles* – a replacement of FASB Statement No. 162. *FASB Accounting Standards Codification* (ASC) became the source of authoritative U.S. accounting and reporting standards for nongovernmental entities, in addition to guidance issued by the SEC, effective for financial statements issued for reporting periods that ended after September 15, 2009. The Codification did not change existing U.S. GAAP. These allegations use the historical references to U.S. GAAP, as such references existed during the Class Period.

104. Omnicare failed to comply with GAAP revenue recognition criteria and Omnicare's accounting did not accurately reflect the economic substance of the underlying transactions with J&J and other drug manufacturers. Accounting entries that are contrary to the economic substance of what has transpired are not faithful representations of the event and are inherently unreliable. Accounting must reflect the basic nature of what has transpired to provide meaningful information to investors. The quality of reliability and, in particular, of representational faithfulness leaves no room for accounting representations that subordinate substance to form. Statement of Financial Accounting Concepts ("SFAC") No. 2, *Qualitative Characteristics of Accounting Information*, ¶160. The reliability of a measure rests on the faithfulness with which it represents what it purports to represent, coupled with an assurance for the user that it has that representational quality. To be useful, information must be reliable as well as relevant. SFAC No. 2, Summary of Principal Conclusions – Primary Decision-Specific Qualities – Reliability.

105. The FASB has defined revenues and described its characteristics as follows:

> Revenues are inflows or other enhancements of assets of an entity or settlements of its liabilities (or a combination of both) from delivering or producing goods, rendering services, or other activities that constitute the entity's ongoing major or central operations.

SFAC No. 2, ¶78.

> Revenues represent actual or expected cash inflows (or the equivalent) that have occurred or will eventuate as a result of the entity's ongoing major or central operations.

SFAC No. 2, ¶79.

106. Revenues should not be recognized until they are realized or realizable and earned. According to the FASB, "an entity's revenue-earning activities involve delivering or producing goods, rendering services, or other activities that constitute its ongoing major or central operations, and revenues are considered to have been earned when the entity has substantially accomplished what it must do to be entitled to the benefits represented by the revenues." SFAC No. 5, *Recognition and Measurement in Financial Statements of Business Enterprises*, 183(b). As noted in SFAC No. 5, 184(a), (b) and (d), *revenue should not be recognized by an entity until the entity has substantially accomplished what it must do pursuant to the terms of the arrangement, which usually occurs upon delivery or performance of the services.*

107. Omnicare also did not comply with the SEC's criteria for revenue recognition. As noted in the SEC Staff Accounting Bulletin ("SAB") No. 101,[23] the SEC staff believes that revenue generally is realized or realizable and earned only when *all* of the following criteria are met:

- Persuasive evidence of an arrangement exists,[24]

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[23] SAB 101 was ultimately superseded by SAB 104 in December 2003, but the criteria for revenue recognition did not change.

[24] SFAC No. 2, 163 states "Representational faithfulness is correspondence or agreement between a measure or description and the phenomenon it purports to represent." The SEC staff

- Delivery has occurred or services have been rendered;[25]
- The seller's price to the buyer is fixed or determinable; [26] and
- Collectability is reasonably assured.[27]

108. Omnicare violated GAAP and SEC guidance because:

(a) Omnicare failed to comply with the terms specified in the reimbursement arrangement and failed to accomplish "what it must do pursuant to the terms of the arrangement" between the Company and the U.S. government when Omnicare submitted false reimbursement claims to Medicaid programs;

(b) Omnicare violated the False Claims Act, 31 U.S.C. § 3730(h), and, consequently, the government was entitled to reclaim those reimbursements that Omnicare improperly recognized as revenues;

(c) Omnicare's reimbursements from the government were "subject to refund or adjustment" and, where rebates were paid to Omnicare, the

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believes that evidence of an exchange arrangement must exist to determine if the accounting treatment represents faithfully the transaction. *See also* Statement of Position ("SOP") 97-2, 18. The use of the term "arrangement" in SAB 101 is meant to identify the final understanding between the parties as to the specific nature and terms of the agreed-upon transaction.

[25] SFAC No. 5, 184(a), (b) and (d).

[26] SFAC No. 5, 183(a); Statement 48, 16(a); SOP 97-2 defines a "fixed fee" as a "fee required to be paid at a set amount that is not subject to refund or adjustment."

[27] Accounting Research Bulletin ("ARB") No. 43, Chapter 1A, 11 and Accounting Principles Board ("APB") Opinion 10, 112. *See also* SFAC No. 5, 184(g) and SOP 97-2, ¶8.

government did not get the benefits of the rebates that pharmaceutical manufacturers paid to Omnicare;

(d) Where kickbacks were paid to, or received by, Omnicare, Omnicare's false reimbursement claims violated the anti-kickback statute, and the collectibility of reimbursements from the government; and

(e) Where Omnicare improperly substituted one form of a drug for another, for the purpose of obtaining greater reimbursements from the government, Omnicare violated the False Claims Act, and the government was entitled to reclaim those reimbursements that Omnicare improperly recognizes as revenues.

109. Omnicare failed to "fulfill the terms in the arrangement" with the U.S. government per SAB 101; Omnicare was not "entitled the benefits represented by the revenues" per SFAC No. 5, ¶83(b); and collectibility was not reasonably assured per ARB 43, Chapter 1A, ¶1, APB Opinion 10, ¶12, Concepts Statement 5, ¶84(g), and SOP 97-2, ¶8. The terms in the arrangement that Omnicare failed to comply with were not inconsequential or minor technical requirements; but rather, those terms were an integral part of the Medicaid reimbursement process. Violations of the False Claims Act can subject the perpetrator to *three times the Government's damages plus civil penalties of $5,500 to $10,000 per false claim.* 28 U.S.C. 2461 note; Public Law 104-410. Violations of the anti-kickback statute can subject the perpetrator *to exclusion from participation in federal health care programs and, effective August 6, 1997, civil monetary penalties of $50,000 per violation and three times the amount of the remuneration paid.* 42 U.S.C. § 1320a-7(b)(7); 42 U.S.C. § 1320a-7a(a)(7).

Omnicare Improperly Recognized Revenues from Fees, Rebates and Discounts from Johnson & Johnson and Other Drug Manufacturers

110. Omnicare's financial statements were also inaccurate because the Company improperly recorded fees, rebates, and discounts from J&J and other drug manufacturers as revenues. Rather than reducing the actual costs of Omnicare's purchases of drugs on its books, the Company improperly booked the cash inflows from the manufacturers, such as fees, discounts, rebates and concessions, as revenues. Omnicare's cash inflows from those pharmaceutical manufacturers did not qualify as revenues because they did not result from delivering or producing goods, rendering services, or other activities that constituted the Company's major or central operations, as required by GAAP and SEC guidance. The cash inflows from the pharmaceutical manufacturers were, in substance, payments to drive sales of drugs. Omnicare was not entitled to recognize revenues because the Company did not, in substance, receive the payments as a result of the delivery of goods or provision of services that comprise the Company's ongoing, major operations. SFAC No. 2, ¶78; SFAC No. 6, ¶¶78-79. In addition, revenue may not be recognized until it is realized or realizable and earned, and Omnicare was not entitled to the benefits represented by the revenues. SFAC No. 5, ¶83(b).[28]

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[28] In Emerging Issues Task Force [EITF] Issue No. 02-16 *Accounting by a Customer (Including a Reseller) for Certain Consideration Received from a Vendor*, ¶4, the FASB crystallized earlier guidance and advised that for arrangements entered into after November 21, 2002 that rebates, discounts, and other cash concessions are not revenues and should be treated as reductions in the cost of sales. "[C]ash consideration received by a customer

111. The cash inducements that Omnicare received from the drug manufacturers did not satisfy the GAAP criteria for revenue recognition. Revenue should not be recognized until it is realized or realizable and earned. *See* ¶106 above. Omnicare did not earn revenue from the inducements because the cash inflows were not produced as a result of the Company's ongoing major or central operations. The payments were improperly characterized as fees for the purchase of "data," "grants," "educational funding," "sponsorships fees," and other such explanations to disguise the true purpose of the payments which was to incentivize Omnicare to expand the sales of the pharmaceutical manufacturers' drugs.

112. The cash received as inducements also does not meet the SEC's criteria for revenue recognition. *See* ¶107 above. Omnicare's recognition of revenues from the inducements that Omnicare received violates SEC guidance because there is no persuasive evidence of an arrangement in which Omnicare was to deliver any products or perform any services, nor did Omnicare perform any genuine services in connection with "data," "grants," or "sponsorship fees."

113. Omnicare and J&J entered into a "Consulting and Services Agreement" to create the false appearance of a legitimate arrangement, as if Omnicare were providing services of value in exchange for fees. In connection with the cash inducements from J&J, Omnicare improperly recognized, at a minimum, a total of $8,557,413 in revenues as follows: (a) $2,500,000 in 2Q02; (b) $450,000 in 3Q00; (c) $300,000

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from a vendor is presumed to be a reduction of the prices of the vendor's products or services and should, therefore, be characterized as a reduction of cost of sales when recognized in the customer's income statement." *Id.*

in 4Q00; (d) $2,282,609 on purchases of Duragesic® in 4Q01; (e) $326,003 on purchases of Ultram® in 4Q01; (f) $866,096 on purchases of Ditropan® XL in 4Q01; (g) $98,640 on purchases of Topamax® in 4Q01; (h) $231,897 on purchases of Reminyl® in 4Q01; (i) $51,956 on purchases of Aciphex® in 4Q01; (j) $50,212 on purchases of Regranex® in 4Q01; (k) an additional $1,200,000 in 2001; (l) $1,200,000 in 2002; (m) $1,200,000 in 2003; and (n) $1,200,000 in 2004. GAAP and SEC guidance required that the cash that Omnicare received from J&J be treated as reductions in Omnicare's purchase costs, rather than as increases in revenues in Omnicare's income statements during those time periods. *See* ¶115 below, for a chart summarizing the improper revenues that Omnicare recognized from the cash inducements that the Company received from J&J and other drug manufacturers.

114. Omnicare's undisclosed contractual relationships with drug manufacturers were not limited to J&J. As detailed in Kammerer's initial complaint filed on January 5, 2008, this practice was routinely done with other drug manufacturers as well, including, but not limited to Abbott Labs, AstraZeneca Pharmaceuticals, Bayer Corporation, Eli Lilly & Company, Inc., Novartis, Novo Nordisk, Pharmacia, and Ivax. In Omnicare's dealings with each of these drug manufacturers, the Company was not entitled to recognize revenues from the payments those drug manufacturers made to Omnicare because the Company did not receive the payments as a result of the delivery of goods or provision of services that comprise the Company's ongoing, major operations, as required by GAAP and SEC guidance. SFAC No. 2, ¶78, SAB Topic 13. In addition, revenue may not be recognized until it is realized or realizable and earned, and

Omnicare was not entitled to the benefits represented by the revenues. SFAC No. 5, ¶83(b). Omnicare's improper accounting for the cash inducements from the drug manufacturers was qualitatively material because, among other things, it violated the GAAP principle of reliability. That is, recording the sums received as revenue misled the public into believing that such sums were obtained as a result of the Company's core operations. The cash consideration that Omnicare received from the drug manufacturers should have been characterized as a reduction of the cost of sales rather than as revenues, and consequently, Omnicare's financial statements for fiscal years 2000 through 2002 were false. *See* Ex. 42.

115. The following chart summarizes the minimum revenues that Omnicare improperly recognized from cash inducements that the Company received from J&J and other drug manufacturers in exchange for improperly promoting their drugs:

Omnicare Inc.

Summary of Cash Inducements Improperly Recognized as Revenues

(In thousands of dollars except percentages	Year Ended Dec. 31, 2000	Year Ended Dec. 31, 2001	Year Ended Dec. 31, 2002	Year Ended Dec. 31, 2003	Year Ended Dec. 31, 2004
Overstated Revenues:					
Cash from J&J	$3,250	$5,107	$1,200	$1,200	$300
Cash from Abbott Laboratories		3,760			
Cash from AstraZeneca Pharmaceuticals		13,200			
Cash from Bayer Corporation		1,576			
Cash from Eli Lilly & Company		9,874			
Cash from Novartis		3,652			
Cash from Novo Nordisk		6,285			
Cash from Pharmacia		6,405			
Cash from Ivax	2,133	2,133	2,133		
Total Overstated Revenues from Cash Inducements from Drug Manufacturers	$5,383	$51,993	$3,333	$1,200	$300

See also Ex. 42.

Omnicare Improperly Recognized Revenues from Drug Switching

116. As set forth in ¶¶40-45 above, Omnicare defrauded the government by changing LTCF

patients' prescriptions for Ranitidine (generic Zantac), a popular antacid and the second-most prescribed medication in nursing homes, from tablets to capsules in order to inflate government reimbursements by as much as 400%.

117. Beginning in 2000 and continuing to December 31, 2002, Omnicare took advantage of the fact that the government had not limited the price at which it would reimburse Ranitidine capsule prescriptions by systematically instructing its clerical staff to alter physician orders for Ranitidine from tablets to capsules, in violation of state and federal law. Moreover, in order to create the appropriate conditions to illegally maximize their Ranitidine reimbursements, Omnicare altered its computers to make it virtually impossible for data entry clerks to enter any prescription orders for Ranitidine tablets. Omnicare violated the False Claims Act, and was liable for treble damages and penalties because they used this scheme to obtain reimbursement for over $10 million in false claims for inflated and unjustified costs. Consequently, Omnicare was not entitled to recognize at least $10 million in revenues during the period January, 1, 2000 through December 31, 2002 because Omnicare failed to comply with GAAP and SEC revenue recognition criteria per ¶¶106-109 above. *See also* Ex. 42.

Omnicare's Cash Payments to MMS and Other Nursing Home Operators Constituted Round-tripping, Resulting in Overstated Revenues

118. In 2004, Omnicare engaged in a sham transaction to acquire Mariner Medical Services ("MMS"), a shell corporation owned by Mariner that the Company purchased for nearly $50,000,000. Omnicare not only failed to report the transaction, but improperly recorded more than $47 million in revenue and goodwill.

119. Mariner is a Delaware corporation headquartered in Atlanta, Georgia, and prior to and during 2004 was one of the largest nursing home chains, operating approximately 252 nursing homes with 32,000 nursing home beds. Ex. 12 at ¶9. On April 1, 2003, Omnicare and Mariner entered into a 64-month contract for pharmacy services. *Id.* at ¶27. Pursuant to the contract, Omnicare agreed to implement drug-switching programs with the specific goal of saving Mariner $2.5 million per year. *Id.* During the contract period, Mariner was Omnicare's largest nursing home customer, generating approximately $155 million in revenue and $26 million in profit for Omnicare in 2004 alone. *Id.* at ¶28.

120. Fifteen months into the contract, on June 29, 2004, Mariner announced that it was being sold to National Senior Care, Inc., and the transaction consummated on December 10, 2004. *Id.* at ¶29. On November 23, 2004, just prior to the acquisition's close, Mariner sent Omnicare a Termination Notice, stating that the 2003 contract between Mariner and Omnicare would terminate upon close of the acquisition. *Id.* at ¶31.[29]

121. On December 2, 2004, defendants Gemunder and Froesel met with Mariner's agents, who proposed that Mariner would withdraw the Termination Notice in exchange for Omnicare's agreement to purchase one of Mariner's business units, called MMS. *Id.* at ¶32. MMS was a shell corporation with just two employees and no tangible assets apart from accounts receivable valued at less than $3 million. *Id.* The sole function

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[29] Post-acquisition, Mariner nursing homes was divided between Mariner and a newly created entity called Sava (collectively, "Mariner"). *Id.* at ¶29.

of MMS was to deliver feeding tube supplies to Mariner nursing homes and bill Medicare for the supplies. *Id.* Mariner's agents further explained that the objective of the Termination Notice and the proposal to withdraw the notice was to obtain financing for the acquisition. *Id.* at ¶33.

122. During the meeting, Gemunder contacted its outside counsel to discuss the proposal. *Id.* at ¶34. Omnicare's attorneys advised Gemunder that to condition the Termination Notice withdrawal on Omnicare's agreement to purchase MMS would constitute a violation of the Federal Anti-Kickback Statute because Omnicare would effectively be paying Mariner for utilizing Omnicare's pharmacy services. *Id.*

123. On December 7, 2004, Omnicare's board of directors met to consider the proposal. *Id.* at ¶38. An internal Omnicare memorandum explained that Omnicare would be paying an exorbitant sum for a business unit worth very little:

> "For the total anticipated consideration to the seller of $50,000,000, plus estimated transaction-related expenses of $285,000, Omnicare will receive tangible assets with an estimated net book value of $2,904,000 [consisting of accounts receivable] and create goodwill and other intangible assets of $47,381,000."

Id. However, one of Omnicare's investment bankers noted that with "3 YEARS LEFT ON [THE] CURRENT DEAL," Omnicare would be giving up "$155MM/REVS [and] $26MM/OP PROFITS" per year. *Id.* at ¶39. Consequently, the Omnicare board approved the acquisition for $50 million, and Omnicare paid $40 million up front before the deal closed. *Id.* at ¶¶46-48.

124. Notwithstanding Omnicare's outside counsel's advice that the Company's acquisition of MMS must not be consummated for the purpose of retaining the pharmacy services contracts, Omnicare effected the transaction to retain the contracts. *See id.* at ¶¶49-56. In an effort to ensure that Mariner would not run afoul of the agreement, Omnicare insisted that Mariner sign new 15-year pharmacy services contracts with Omnicare prior to paying the $40 million. Mariner complied and signed the new contracts first. *Id.* at ¶47.

125. Healthcare regulatory lawyers representing Omnicare explained to Mariner that "simultaneous sale of [MMS] could be viewed as consideration for the pharmacy contracts." *Id.* at ¶¶43-45. Accordingly, in order to obtain the approval of counsel, Omnicare misrepresented that MMS was not owned by Mariner. *Id.* at ¶¶49-56. Ultimately, Omnicare's outside counsel conditioned his approval of the transactions on receipt of signed certificates attesting to the independence of the acquisition and the pharmacy services contracts. *Id.* at ¶52; *see also id.* at ¶¶57-59.

126. As detailed herein, on or about December 10, 2004, Omnicare paid $40 million for MMS, followed by a payment of $10 million on June 30, 2005 – for a total payment of $50 million. Omnicare accounted for the transaction by recording the entire $50 million as assets – $2,904,000 in tangible assets (accounts receivable) and the remaining $47,096,000 in goodwill. Additionally, the Company capitalized its transaction costs, recording an additional $285,000 in goodwill, for a total of $47,381,000 in goodwill.

127. Omnicare's accounting treatment of the MMS acquisition costs was improper. The Company was not entitled to record any of the MMS acquisition costs as goodwill. Goodwill is defined as "[t]he excess of the

cost of an acquired entity over the net amounts assigned to assets acquired and liabilities assumed." SFAS No. 141, *Business Combinations*, Appendix F, Glossary, Goodwill. However, according to GAAP, Omnicare could only recognize goodwill in connection with MMS to the extent the Company "*expected to benefit from the synergies of the combination*." SFAS No. 142, ¶34. But MMS had no core business, cash flows, or operation, other than to collect the outstanding accounts receivables worth just $2,904,000. The MMS acquisition was, in fact, a canard, and Omnicare paid $47,096,000 in excess of the fair value of MMS' total net assets solely for the purpose of obtaining new 15-year contracts with Mariner. Accordingly, Omnicare did not expect the MMS entity to yield any synergies and should not have recorded the $47,096,000 as goodwill. Similarly, the $285,000 in transaction-related costs for the MMS transaction should not have been recognized as part of goodwill. Such amounts spent were not expected to yield synergies, but simply amounted to the cost of effecting the transaction.

128. Omnicare also improperly recorded sums received from Mariner pursuant to the pharmacy services contracts as revenue. When Omnicare agreed to purchase MMS in 4Q04, Omnicare effectively agreed to pay $47,096,000 in *excess* of MMS's true value of $2,904,000. Omnicare did this in order to get Mariner to sign new 15-year contracts with Omnicare, and in fact, Omnicare required Mariner to sign those contracts before it agreed to buy MMS. The signing of the contracts in late 4Q04 and Omnicare's purchase of MMS were "linked" transactions. In substance, Omnicare bought $47,096,000 of its own future revenues from Mariner because the $47,096,000 in funds flowed from Omnicare to Mariner, and then back again to

Omnicare. This circular flow of funds is called "round-tripping" and no legitimate earnings process occurred. Accordingly, Omnicare improperly recorded revenue for the first $47,096,000 received from Mariner under the contracts.

129. Round-tripping is a scheme used to improperly inflate revenues. The AICPA has described round-trip transactions as follows:

> "Round-trip" or "linked" transactions occur when a company enters into a seemingly valid sales transaction with a customer but sends all or some of the sales proceeds back to the customer in another seemingly valid purchase transaction often affecting a different accounting period.

Practice Alert 2003-01, AICPA, June 2007.

130. Recording revenues in a round-trip transaction violates GAAP because it elevates form over substance. In a round-trip revenue recognition transaction, the economic substance of the transaction is a circular flow of cash (or other assets of value), rather than an arm's-length transaction. *See* ¶¶104-107 above.

131. Omnicare round-tripping transactions failed to comply with the GAAP requirement that "cash consideration (including a sales incentive) given by a vendor to a customer is presumed to be a reduction of the selling prices of the vendor's products or services and, therefore, should be characterized as a reduction of revenue when recognized in the vendor's income statement." EITF Issue No. 01-9, *Accounting for Consideration Given by a Vendor to a Customer (Including a Reseller of the Vendor's Products)*, ¶9.

132. The revenues in round-tripped transactions

also do not meet the GAAP criteria and SEC guidance for revenue recognition as described in ¶¶104-107 above. Revenue is not earned in a round-trip transaction because the company initiating the round-trip transaction is using its own cash or other assets to "buy" or "create" revenues, and the cash inflows were not produced as a result of the company's ongoing major or central operations. Omnicare violated these principles of revenue recognition when it recorded $47,096,000 in revenue from Mariner. As a result of the transaction with Mariner and MMS, Omnicare overstated goodwill by $47,381,000 and improperly overstated recognized revenues and operating income of $47,096,000 in 2004 in connection with the bogus MMS acquisition. *See* Ex. 42.

133. Additionally, the MMS transaction was a reportable event under GAAP. In FY04, Omnicare reported $398.6 million in cash payments for acquisitions. The MMS transaction alone represented about 14.8% of the Company's total goodwill acquired and 17.4% of the Company's goodwill acquired in the Pharmacy Services Segment in 2004. Moreover, the $47,381,000 in "goodwill" constituted 34.4% of the total goodwill acquired by Omnicare and 48.9% of the goodwill acquired in the Pharmacy Services Segment, in 4Q04.

134. Indeed, SFAS No. 141, requires a company to disclose both material business combinations and business combinations in which amounts assigned to goodwill represent a "significant" portion of the total acquisition costs. SFAS No 141, ¶52. Accordingly, in connection with Omnicare's acquisition of MMS in 2004, Omnicare failed to disclose the following information required by GAAP:

- The name and a brief description of the acquired entity and the percentage of voting equity interests acquired;
- The primary reasons for the acquisition, including a description of the factors that contributed to a purchase price that results in recognition of goodwill;
- The period for which the results of operations of the acquired entity are included in the income statement of the combined entity;
- The cost of the acquired entity and, if applicable, the number of shares of equity interests (such as common shares, preferred shares, or partnership interests) issued or issuable, the value assigned to those interests, and the basis for determining that value; and
- A condensed balance sheet disclosing the amount assigned to each major asset and liability caption of the acquired entity at the acquisition date.

Id. at ¶51. In addition, because the amount Omnicare assigned to goodwill in connection with the MMS acquisition, *i.e.*, $47,381,000, was "significant in relation to the total cost of the acquired entity" of $50 million, Omnicare failed to comply with the requirement to disclose the total amount of goodwill for the MMS acquisition. *Id.* at ¶52.

135. Omnicare also paid kickbacks to other nursing home owners in exchange for pharmacy services contracts in connection with Omnicare's acquisitions of other pharmacy service operators.

136. Omnicare acquired Medistat Pharmacy Services in early 2004, and in connection with that acquisition, Medistat paid $6 million to an individual

who owned the Avante nursing home chain in exchange for a pharmacy services contract with Avante. Omnicare's purchase of Medistat required that Omnicare separately pay $6 million to the owner of the Avante nursing home chain, and Omnicare subsequently benefitted from the contract with Avante after the acquisition was completed. In substance, therefore, Omnicare bought $6 million of its own revenues by overpaying that amount to acquire Medistat in order to secure the nursing home contract with Avante.

137. In August 2004, Omnicare also paid kickbacks to nursing home operators in exchange for nursing home contracts is connection with its $50 million acquisition of Pharmco. In connection with the Pharmco acquisition, Omnicare paid $1 million to two shareholders of Pharmco specifically to obtain pharmacy service contracts with nursing home chain Cypress Healthcare ("Cypress"). In substance, therefore, Omnicare bought $1 million of its own revenues by overpaying that amount to acquire Pharmco in order to secure the nursing home contract with Cypress.

138. In mid-2004, Omnicare acquired Total Pharmacy, a company that provided pharmaceutical products exclusively to nursing homes owned or controlled by Philip Esformes and/or his father Morris ("Esformes-Controlled Nursing Homes"). Ex. 13 at ¶¶136-40. Philip Esformes was a part-owner in Total Pharmacy. *Id.* at ¶¶136-37. Prior to the acquisition, Total Pharmacy maintained one-year contracts with the Esformes-Controlled Nursing Homes. *Id.* at ¶¶143-48. Initially, Omnicare offered to pay $16-$18 million for Total Pharmacy, including $7 million in accounts receivables – effectively a $9-$11 million

offer. *Id.* at ¶149. Morris Esformes and the owners of Total Pharmacy (*i.e.*, Tim Dacy with a 51% interest, Philip Esformes with a 40% interest, and Bruce Paler with a 9% interest) were dissatisfied with the $16 million offer. Defendant Gemunder thus negotiated with Morris Esformes to pay Total Pharmacy $25 million and forfeit the $7 million in accounts receivable if the Esformes-Controlled Nursing Homes would extend their pharmacy services contracts from one year to ten years. *Id.* at ¶¶150-54. *See also id.* at ¶¶155-59. The parties agreed to backdate the contracts with the Esformes-Controlled Nursing Homes and Omnicare completed the acquisition of Total Pharmacy in June 2004. As a result, Omnicare paid an additional $16-$23 million to the owners of Total Pharmacy for the sole purpose of securing extended pharmacy services contracts with the nursing homes. Omnicare thereby round-tripped at least $16 million of revenues because Omnicare in substance bought $16 million of its own revenues from those nursing homes.

139. In connection with Omnicare's acquisitions of Medistat, Pharmco, and Total Pharmacy, Omnicare improperly obtained guaranteed referrals for services for which payment was made by government health care programs. Omnicare obtained those guaranteed referrals by overpaying for those acquisitions or making separate side payments to obtain the business. Omnicare's cash inducements to obtain contracts with Avante and Cypress, and nursing homes controlled by one of the owners of Total Pharmacy were tantamount to round-tripped funds because $6 million of the Avante revenues, $1 million of the Cypress revenues, and at least $16 million of the Total Pharmacy revenues from those respective contracts were bought with Omnicare's own money. Consequently, Omnicare

inflated its revenues and operating income on its income statements by the amounts of those overpayments. *See* the accounting guidance described in ¶¶104-107, 129-131 above; *see also* the financial impact of Omnicare's overstatements of revenues and operating income in the chart shown in Ex. 42.

140. Moreover, Omnicare's total acquisitions in 2004 in the aggregate were unquestionably material and, as such, Omnicare failed to follow required GAAP disclosures. Even if a series of business combinations completed during the period are individually immaterial, they may be material in the aggregate. In such cases, a company must disclose the number of entities acquired and a brief description of those entities. Ex. 13 at ¶53. Omnicare's total acquisitions in 2004 were material and the Company failed to make appropriate disclosures. Instead, the Company advised investors that none of its acquisitions were "individually significant."

The Prospectus Misrepresented Omnicare's Collection Practices and Doubtful Accounts and Valuation of Receivables

141. The Prospectus also materially misrepresented and failed to disclose the Company's practices with respect to collections and past-due accounts. Defendants improperly recognized revenue on such accounts even though collections were not reasonably assured. Because Omnicare did not accurately account for uncollectible accounts in its financial statements, Omnicare's Registration Statement and Prospectus materially overstated operating income by at least $100 million as of the nine months ended September 30, 2005. *See* Ex. 42.

142. The 2004 Form 10-K, incorporated by reference in the Prospectus, contained the following statements about the Company's Critical Accounting Policies:

> Revenue Recognition
>
> *Revenue is recognized by Omnicare when products or services are delivered or provided to the customer.*
>
> * * *
>
> Allowance for Doubtful Accounts
>
> Collections of accounts receivable from customers is the Company's primary source of operating cash flow and is critical to Omnicare's operating performance. Omnicare's primary collection risk relates to facility and private pay customers. The Company provides for accounts receivable that could become uncollectible by establishing an allowance to reduce the carrying value of such receivables to their estimated net realizable value. *Omnicare establishes this allowance for doubtful accounts using the specific identification approach, and considering such factors as historical collection experience (i.e., payment history and credit losses) and creditworthiness, specifically identified credit risks, aging of accounts receivable by payor category, current and expected economic conditions and other relevant factors. Management reviews this allowance on an ongoing basis for appropriateness.* Judgment is used to assess the collectability of account balances and the economic ability of customers to pay.

Id.

143. The Company reported the following past-due accounts receivable in its 2004 Form 10-K:

Period Ending	0-180 Days Past-Due	>180 Days Past-Due
December 31, 2004	$792,895	$169,098
December 31, 2003	$654,037	$133,031

144. The Company also made the same representation regarding its Allowance for Doubtful Accounts in the 1Q05, 2Q05 and 3Q05 Form 10-Q's:

Period Ending	0-180 Days Past-Due	>180 Days Past-Due
March 31, 2005	$815,187	$187,991
December 31, 2004	$792,895	$169,098

Period Ending	0-180 Days Past-Due	>180 Days Past-Due
June 30, 2005	$840,072	$203,303
December 31, 2004	$792,895	$169,098

Period Ending	0-180 Days Past-Due	>180 Days Past-Due
Sept. 30, 2005	$1,146,490	$270,046
December 31, 2004	$792,895	$169,098

145. According to CW2, a former Omnicare Account Specialist from September 2004 to August 2005, Omnicare did not adequately reserve for doubtful receivables and did not write-off known uncollectible

receivables.[30] As part of CW2's regular duties at Omnicare, CW2 prepared internal reports that detailed which receivables were required to be written-off. Before writing-off an uncollectible receivable, all collection efforts must be exhausted and it must be determined that future collection is not reasonably assured. It was CW2's experience that defendant Gemunder and the senior management, including Richow, Director of Credit and Collections, denied write-offs that met this criteria. CW2 states that the senior management would decide not to push for payment of past due accounts from facilities that were still active because Omnicare was still making money off them and Omnicare did not want to "piss them off." According to CW2, even if a facility had an outstanding unpaid balance of, *e.g.* $4 million, Omnicare would neither attempt collection, nor write off the amount, if the facility was still requesting monthly services, *e.g.* amounting to $400,000, that could be entered into Omnicare's books as revenue. Because these receivables should have been written-off, other current and past sales transactions with the same customers were improperly recognized as

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[30] CW2 worked in a department consisting of four collection specialists who were responsible for collections throughout the United States. Each specialist was responsible for a particular region and CW2 was responsible for the Midwest Region. CW2 reported to the Manager of Credit and Collections, which was Nancy Chouteau ("Chouteau") until mid-2005 and Susan Ruschuer thereafter. Both Chouteau and Ruschuer reported to Director of Credit and Collections Richard Richow ("Richow"), who reported to defendant Gemunder and others. CW2's responsibilities included collecting outstanding balances that facilities owed to Omnicare pharmacies by entering into promissory arrangements with the facilities. CW2's proposed promissory notes were approved by Richow and then forwarded to Gemunder for final approval.

revenue. Because Omnicare could not collect from such customers, collectability was not reasonably assured from those customers under GAAP. However, Omnicare inaccurately recorded these transactions as revenue. These customers did not have immaterial outstanding receivable balances but rather substantial balances of up to $2 million per account.

146. Furthermore, CW2 states that defendants failed to reserve or write-off receivables for debtors that had entered into bankruptcy proceedings. CW2 stated that $100 million of accounts receivables were outstanding 90 days or more (some of which constituted charges rendered back in 2003 and 2004) and that as much as 60% of accounts receivables were uncollectible. Had defendants properly accounted for Omnicare's uncollectible accounts and current transactions, Omnicare's financial statements would have revealed Omnicare's dire financial situation, as net income and EPS would have been completely eliminated. Because Omnicare did not accurately account for uncollectible accounts in its financial statements, Omnicare's Registration Statement and prospectus materially overstated operating income by at least $100 million as of the nine months ended September 30, 2005.

147. CW3, a former Regional and National Facility Analyst in Omnicare's National Credit and Collections Department in Omnicare's headquarters in Covington, Kentucky, corroborated Omnicare's failure to write-down receivables that were uncollectible. In the midst of government investigations into Omnicare's billing practices and Omnicare's attempted settlement with the Michigan Attorney General concerning Medicaid fraud charges, the Company became con-

cerned that the scheme would be exposed. Accordingly, beginning in June 2006, Omnicare created new positions, including CW3's position, to begin collecting on, or create the appearance of collecting on, the outstanding facilities charges discussed above, which included charges for supplies and non-prescription drugs that are not reimbursed by the government. CW3 was hired in June 2006 and initially focused on collections in eight states, but was eventually promoted to take responsibility for the state of New York which had a very high concentration of Omnicare facilities.[31]

148. According to CW3, Omnicare made no attempt to collect unpaid accounts receivable on facilities charges prior to June 2006. In fact, Omnicare had no genuine intention to collect outstanding accounts receivable for many of the facilities charges because Omnicare had agreed to pay those charges in exchange for LTCFs' promises to purchase more prescription drugs than necessary from Omnicare, thereby inflating Omnicare's reimbursements from Medicare and Medicaid. According to CW3, Omnicare would induce

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[31] CW3 reported to Manager Ruscher who reported to Director Richow. CW3's daily responsibilities were to seek payment on accounts receivable in the state of New York which amounted to more than $25 million. CW3's job was to negotiate a settlement figure that everyone was comfortable with, which typically amounted to about $2 million per month – just a fraction of what was on the books as accounts receivable. A typical settlement amounted to $200,000 on a $3 million debt. The process of settling the accounts involved CW3's submission of a proposed written settlement to Ruscher, which would be forward to Richow for approval, and then ultimately to defendants Froesel and Gemunder who would bring the proposal to the Board of Directors for their approval. CW3 was uncertain whether the facilities ever actually paid the settlement amount.

an LTCF to over-prescribe drugs worth, *e.g.* $500,000, that were reimbursable from government sources, in exchange for Omnicare's promise not to collect on, *e.g.* $100,000, in facilities charges. CW3 learned of the scheme because, upon contacting nursing homes to discuss payment of the facilities charges, the facility owner or administrator would refuse to agree to any settlements concerning the facilities charges and state that he/she would "be taking [the matter] up with Joel [Gemunder]" who had struck the deal with facility. CW3 specifically recalled that when he attempted to collect on tens of millions of dollars in outstanding bills from Catholic Charities, which ran a number of nursing homes in New York, the part-owner with whom CW3 spoke said "I'm not dealing with you. I'll just call Joel." According to CW3, the Regional Controllers as well as the presidents and/or executive directors of Omnicare pharmacies would receive a cut of the profit from these schemes as an incentive to keep quiet. CW3 stated that Omnicare employees were well aware that these practices amounted to kickbacks and both Ruscher and Richow were constantly worried that the Company would be charged with "inducement." CW3 estimated that accounts receivable associated with these facilities charges schemes amounted to $500 million.

149. CW3 ultimately learned that the primary purpose of his position was to give the "appearance" of collecting on the facilities charges, not actually to collect on them, and that CW3 and his/her colleagues recognized that "the only reason we had a job was to cover up inducements." As a result of this conduct, Omnicare not only improperly boosted its revenue through higher Medicaid or Medicare reimbursements, but also overstated its accounts receivable and understated its allowance for doubtful account.

150. CW4, a former Omnicare Collections Specialist based at Covington Headquarters from November 2004 to April 2006 whose responsibilities included collection of accounts in the State of Connecticut that were 90 days past due, also corroborates the collection issues within CW4's geographic region.[32] CW4 estimated that 25% of all individuals in LTCFs located in Connecticut lacked prescription benefits. CW4 further indicate that of those individuals lacking prescription benefits, 40-60% lacked the resources to pay their debt balance owed to Omnicare. According to CW4, the 90-days past due at Omnicare's Connecticut region was a few million dollars in 2004 and 2005. CW4 alone managed the past-due accounts that were more than 90-days past due and CW4's portfolio was estimated to be worth over $1.4 million. CW4 also states that his/her colleague had a larger collections portfolio in the same region, further supporting that Omnicare did not adequately reserve for doubtful receivables and did not write-off known uncollectible receivables.

151. CW5 is a former Regional Staff Accountant in Omnicare's Northwest Ohio office in the Great Lakes region from March 2005 to August 2006 whose job was to handle the reconciliation of accounts payable, accounts receivable and aging accounts for her region as well as month-end journal entries, quarterly reports and Sarbanes-Oxley reports.[33] CW5 states that in March 2005, CW5 observed that the number contained in the computer system for aging accounts

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[32] CW4 reported to Manger Chouteau who reported to Director Richow. CW4 was one of two individuals responsible for collections of receivables 90 days past-due in the state of Connecticut.

[33] CW5 reported to John Girts, Controller for Omnicare in Northwest Ohio, who reported to Brian Sedlock ("Sedlock"), Controller of the Great Lakes Region.

receivable did not match the numbers in the ledger. In fact, Omnicare's bookkeeping of aging accounts receivable information was so sloppy that reconciliation was not possible. Omnicare did not keep information detailed enough to identify the discrepancy to any specific accounts. To resolve the discrepancy, *CW5's supervisor advised her to plug the difference into current to avoid any inquiries from the auditors*. CW5 would be instructed to plug discrepancies into current even when the account, or facility, no longer existed. CW5 states that this was a standard practice at Omnicare for reconciling aging accounts receivable. CW5 and his/her colleagues acknowledged that "there is the way you learned it in school, and then there's the Omnicare way," meaning that the Company's accounting practices were improper. According to CW5, when external auditors came to the office, they were only given the general ledger and never saw the backup. As a result of these practices, Omnicare overstated accounts receivable and understated its aging A/R and allowance for doubtful account.

152. Defendants falsely inflated Omnicare's net income and EPS by not adequately reserving for and failing to write-off uncollectible receivables, rendering the Prospectus false and misleading. Omnicare's failure to reserve for and write-off uncollectible receivables was in violation of GAAP and SEC rules. When it is believed that receivables will likely become uncollectible, GAAP mandates that an allowance be recorded by incurring an expense in the period that this becomes known. Such loss contingencies are required by SFAS No. 5, *Accounting for Contingencies*.

153. Additionally, GAAP requires "an expense or loss is recognized if it becomes evident that previously

recognized future economic benefits of an asset have been reduced or eliminated." SFAS No. 5, ¶87. Omnicare's financial statements violated the most basic theories of accounting which require doubtful receivables to be reserved for and uncollectible receivables to be written-off as charges to earnings in the applicable reporting periods. Contrary to GAAP, obvious uncollectible receivables remained on Omnicare's balance sheet with no corresponding reserves or write-off of uncollectible accounts. Furthermore, defendants improperly recognized revenue on these transactions because collection was not reasonably assured. The GAAP and SEC guidance are discussed in further detail in ¶¶104-107 above.

154. CW6, a former Senior Staff Accountant from August 2004 to mid-2006 who worked at Omnicare's headquarters in Covington, Kentucky, also corroborates on Omnicare's improper accounting practices.[34] According to CW6, Omnicare's accounting practice was to make financial reporting look good, not to make it accurate. In particular, during CW6's tenure, Medicaid and Medicare accounts receivable were huge. CW6 further states that Omnicare also had a huge "unapplied cash." Omnicare was putting unapplied cash into accounts receivable that had no relationship to the cash applied because Omnicare's senior management, including defendants Gemunder

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[34] CW6 was responsible for several regions, including the Great Plains region. CW6 reported to Controller Chris Guin who reported to RCFO Sedlock. CW6 was responsible for preparing what was called the "Froesel Report" for the Great Plains region containing the status of accounts receivable. In order to prepare the report, CW6 would get a summary of accounts receivable and unapplied cash, but never got any backup. The Froesel Report was delivered to defendants Froesel and Gemunder every month during a meeting in Covington, attended by the RCFOs.

and Froesel, preferred consistent percentages in the aging buckets from month to month, particularly in the 30-60 day aging bucket for accounts receivable. CW6 states that the sum associated with accounts receivable and unapplied cash was huge, and that for a typical pharmacy in a typical month, "we'd be talking about over $2 million of aging in unapplied cash." CW6 further states that the percentage of unapplied cash applied to the oldest receivables may have varied from region to region but the goal of "making it look good, not accurate" was the same. According to CW6, if "unapplied cash jumped or dipped in a month, the CFO (Froesel) and CEO Gemunder would ask for an answer" because they wanted to see "the same percentage" from month to month. As a result of this practice, CW6 states that old aging – 180 days and older – was "never written off."

155. Unapplied cash is a liability account. Omnicare should normally record the money it receives in the unapplied cash account when there is no invoice to credit a customer's accounts receivable balance, the invoice number is unknown, or a customer has made a duplicate or additional payment to an existing but previously paid invoice. Unapplied cash is a liability account because it possesses the characteristics of a liability as defined in the accounting literature. "A liability has three essential characteristics: (a) it embodies a present duty or responsibility to one or more other entities that entails settlement by probable future transfer or use of assets at a specified or determinable date, on occurrence of a specified event, or on demand, (b) the duty or responsibility obligates a particular entity, leaving it little or no discretion to avoid the future sacrifice, and (c) the transaction or other event obligating the entity has already happened." SFAC No. 6, ¶36. Omnicare

was not entitled to arbitrarily apply funds from the substantial unapplied cash account to any accounts receivable account, let alone to the older accounts receivable items, unless those funds could be properly matched with specific unpaid customer invoices. Omnicare was also obligated to return the funds in the unapplied cash account to customers when those funds could not be matched to specific unpaid customer invoices. "Entities routinely incur most liabilities to acquire the funds, goods, and services they need to operate and just as routinely settle the liabilities they incur. For example, accepting a cash deposit or prepayment obligates an entity to provide goods or services or to refund the cash." *Id.* at ¶38. "Once incurred, a liability continues as a liability of the entity until the entity settles it, or another event or circumstance discharges it or removes the entity's responsibility to settle it." *Id.* at ¶42.

Omnicare's Failure to Disclose Risks and Uncertainties

156. GAAP and SOP 94-6, *Disclosure of Certain Significant Risks and Uncertainties*, requires that financial statements prepared in conformity with GAAP must disclose known risks and uncertainties due to the nature of operations and certain significant estimates. Such risks and uncertainties include litigation-related obligations and contingent liabilities.

157. Omnicare improperly failed to disclose the risk that its improper accounting for its scheme to inflate earnings by improperly overcharging Medicaid LTC customers and engaging in drug substitutions created undisclosed contingencies related to these scams that could result in a material adverse impact to the Company should the practice be discontinued or discovered. In its failure to disclose these conditions, Omnicare violated GAAP:

Disclosure regarding an estimate should be made when known information available prior to issuance of the financial statement indicates that *both* of the following criteria are met:

a. It is at least reasonably possible [35] that the estimate of the effect on the financial statements of a condition, situation, or set of circumstances that existed at the date of the financial statements will change in the near term due to one or more future confirming events.

b. The effect of the change would be material to the financial statements. *Id.*

158. Moreover, even if in the extreme event that it were not probable that Omnicare did not incur a liability or loss by the date of the financial statements, or the loss amount could not be reasonably estimated, disclosure of the loss contingency was still required because, at a minimum, there was "at least a reasonable possibility that a loss or an additional loss may have been incurred." SFAS No. 5, ¶10. A "reasonable possibility" means the chance of a future transaction or event occurring is "more than remote but less than likely," and "remote" means the chance of the future events or event occurring is slight. *Id.* at ¶3.

Omnicare's Misstatements Were Material

159. Omnicare's misstatements of revenues and net income caused by Omnicare's improper accounting in the Company's 10-K405 for fiscal years 2000 and 2001,

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[35] "The term reasonably possible is used in this SOP consistent with its use in FASB Statement No. 5 to mean that the chance of a future transaction or event occurring is more than remote but less than likely." SOP 94-6.13 (footnote in original source).

in the Company's 10-K for fiscal years 2002, 2003, and 2004, and in the Company's 10-Qs for the periods ended March 31, 2005 (1Q05), June 30, 2005 (2Q05), and September 30, 2005 (3Q05), incorporated by reference in the Prospectus, were material. The SEC clarified the principles of materiality in SAB 99, issued in August 1999. SAB 99 does not present new materiality standards but, instead, reaffirms long-accepted concepts expressed in auditing and accounting literature. It also provides interpretive guidance to ensure those concepts are properly applied.

160. Among the most important of SAB 99's points are that:

> (a) Registrants and auditors may not rely solely on quantitative criteria to evaluate an item's materiality;
>
> (b) The materiality of items can be determined reliably only if they are evaluated both individually and collectively; and
>
> (c) An intentional misstatement may be illegal even if the item it concerns is immaterial.

161. According to SAB 99, "quantifying, in percentage terms, the magnitude of a misstatement is only the beginning of an analysis of materiality; it cannot appropriately be used as a substitute for a full analysis of all relevant considerations. Materiality concerns the significance of an item to users of a registrant's financial statements. A matter is 'material' if there is substantial likelihood that a reasonable person would consider it important."

162. In addition, SAB 99 says there are several ways in which a "quantitatively small" misstatement

may be material. For example, the misstatement may conceal a failure to meet analysts' expectations or it may convert a loss into a profit. In fact, one of the more widespread abuses that SAB 99 addresses is the intentional recording of immaterial errors in a registrant's financial statements in order to smooth earnings artificially and give a false impression of their stability. To the extent that registrants intentionally misstate immaterial items, they potentially violate provisions of the Securities Exchange Act of 1934, which mandates the use of accurate and reasonably detailed records as the basis for financial statements.

Omnicare's Sarbanes-Oxley Certifications Were False and Misleading

163. Internal control [36] is a process, carried out by an entity's board of directors, management and other personnel, designed to provide reasonable assurance that, among other things, the financial statements are reliable and accurate and that a company complies with applicable laws and regulations.

164. Management of any public company is responsible for establishing and maintaining adequate internal control over financial reporting as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act.

165. Section 13(b)(2) of the Exchange Act states, in pertinent part, that every reporting company must:

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[36] AU 319.06, *Internal Control in a Financial Statement Audit*, defines internal control as "a process – effected by an entity's board of directors, management, and other personnel – designed to provide reasonable assurance regarding the achievement of objectives in the following categories: (a) reliability of financial reporting, (b) effectiveness and efficiency of operations, and (c) compliance with applicable laws and regulations." *Id.*

"(A) make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that . . . transactions are recorded as necessary . . . to permit the preparation of financial statements in conformity with [GAAP]." *Id.* These provisions require an issuer to employ and supervise reliable personnel, to maintain reasonable assurances that transactions are executed as authorized, to properly record transactions on an issuer's books and, at reasonable intervals, to compare accounting records with physical assets. *SEC v. World-Wide Coin Invs., Ltd.*, 567 F. Supp. 724, 750 (N.D. Ga. 1983).

166. Omnicare senior management, and specifically defendants Gemunder and Froesel, were responsible for evaluating the Company's internal controls over financial reporting and reporting the results of their evaluation to investors in Omnicare's 10-Ks and 10-Qs. Defendants Gemunder and Froesel were also responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the Company. As part of their responsibilities, the defendants signed the following Sarbanes-Oxley certifications in the each of the 10-Qs and 10-Ks encompassing the Class Period [37] in which they (1) certified that they had

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[37] The Sarbanes-Oxley Act of 2002 (Public Law 107-204, 116 Statute 745) was enacted July 30, 2002. Specifically, the Sarbanes-Oxley certifications were signed by defendants Gemunder and Froesel in Omnicare's 10-K for the years ended December 31, 2003 and 2004, and in Omnicare's 10-Qs for the quarters ended March 31, 2005, June 30, 2005, and September 30, 2005.

performed evaluations of Omnicare's financial statements, disclosure controls and procedures, and internal controls over financial reporting and (2) certified the accuracy of Omnicare's financial statements and the effectiveness of Omnicare's disclosure controls and internal controls over financial reporting as a result of their evaluations:

I, [CEO or CFO], certify that:

1. *I have reviewed* this [annual report on Form 10-K or quarterly report on Form 10-Q] of the Company.

2. Based on my knowledge, *this report does not contain any untrue statement of a material fact* or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, *the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations, and cash flows of the Company* as of, and for, the periods presented in this report;

* * *

5. The Company's other certifying officer and I have disclosed, based on *our most recent evaluation of internal control over financial reporting*, to the Company's auditors and the audit committee of Company's board of directors:

(a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting, which are

reasonably likely to adversely affect the Company's ability to record, process, summarize, and report financial information; and

(b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting.

* * *

Date: [_____]

/s/ [_____]

Id.

167. These certifications were false because Omnicare's financial statements for fiscal years 2003 and 2004, and for 1Q05, 2Q05 and 3Q05 did not "fairly present in all material respects the financial condition, results of operations, and cash flows of [Omnicare]," as alleged herein. *See* ¶¶103-109 above (GAAP section). This false assertion was made in the certifications pursuant to both Section 302 and Section 906 of the Sarbanes-Oxley Act, which were signed by defendants Gemunder and Froesel and included in Omnicare's 10-Ks for 2003 and 2004, and the Company's 10-Qs for 1Q05, 2Q05, and 3Q05. Those SEC filings were incorporated by reference in Omnicare's Prospectus.

THE INAPPLICABILITY OF THE STATUTORY SAFE HARBOR AND BESPEAKS CAUTION DOCTRINE

168. The statutory safe harbor and/or bespeaks caution doctrine applicable to forward-looking statements under certain circumstances does not apply to any of the false and misleading statements pleaded in this complaint.

169. First, none of the statements complained of herein is a forward-looking statement. Rather they are historical statements or statements of purportedly current facts and conditions at the time the statements were made. Second, the statutory safe harbor does not apply to statements included in financial statements which purport to have been prepared in accordance with GAAP.

170. To the extent any of the false or misleading statements alleged herein can be construed as forward-looking, the statements were not accompanied by meaningful cautionary language identifying important facts that could cause actual results to differ materially from those in the statements. As set forth above in detail, then-existing facts contradicted defendants' statements regarding the Company's business and financial condition.

CLASS ACTION ALLEGATIONS

171. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(3) on behalf of the Class. Excluded from the Class are defendants, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

172. The members of the Class are so numerous that joinder of all members is impracticable. Each of the securities were traded on the NYSE. While the exact number of Class members is unknown to plaintiffs at this time and can only be ascertained through appropriate discovery, plaintiffs believe that there are at least thousands of members in the proposed Class for each security. Record owners and other members of the Class may be identified from

records maintained by Omnicare or its transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

173. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class were similarly affected by defendants' wrongful conduct in violation of federal law complained of herein.

174. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class and securities litigation.

175. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether the Securities Act was violated by defendants' acts as alleged herein;

(b) whether statements made by defendants to the investing public in the Registration Statement and prospectus misrepresented material facts or omitted material facts necessary not to make the statements misleading about the business, operations and management of Omnicare; and

(c) the extent to which the members of the Class have sustained damages and the proper measure of damages.

176. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the

expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

COUNT I

For Violation of § 11 of the Securities Act Against All Defendants

177. Plaintiffs repeat and reallege each of the allegations set forth in the foregoing paragraphs.

178. This claim is brought pursuant to § 11 of the Securities Act, 15 U.S.C. § 77k, on behalf of the Class, against all defendants. Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on theories of strict liability and negligence under the Securities Act.

179. The Registration Statement and Prospectus were false and misleading as detailed herein, as they included misrepresentations and/or omitted to state facts necessary to make the statements made not misleading, and failed to adequately disclose material facts as described above.

180. Omnicare is the registrant of the December 2005 Offering and filed the Registration Statement and Prospectus used in connection with the Offering. Omnicare is the "issuer" of the common stock sold in the Offering as defined in § 11 of the Securities Act. As the issuer, Omnicare is *strictly liable* for the false statements and omissions contained therein under § 11 of the Securities Act.

181. Defendants Gemunder, Froesel, Laney, Hutton and Hodges are responsible for the contents and the dissemination of the Registration Statement

as they each signed the Registration Statement and participated in the preparation and dissemination of the Registration Statement by preparing, reviewing and/or signing the Registration Statement and causing their filing with the SEC.

182. Each of the defendants named in this claim caused to be issued and participated in the issuance of materially false and misleading statements to the investing public which were contained in the Registration Statement, which misrepresented or failed to disclose, *inter alia,* the facts set forth above.

183. Each of the defendants named in this claim prepared, reviewed and/or signed the Registration Statement and/or were sellers of the securities sold in the December 2005 Offering. None of these defendants made a reasonable investigation or possessed reasonable grounds for the belief that the statements contained in the Registration Statement were true and did not omit any material fact and were not misleading.

184. Plaintiffs acquired the securities pursuant and/or traceable to the Registration Statement.

185. Plaintiffs and the Class have sustained damages. At the time of their purchases of the securities, plaintiffs and other members of the Class were without knowledge of the facts concerning the wrongful conduct alleged herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

A. Declaring this action to be a proper class action pursuant to Fed. R. Civ. P. 23;

B. Awarding plaintiffs and the members of the Class damages, including interest;

C. Awarding plaintiffs reasonable costs and attorneys' fees; and

D. Awarding such equitable/injunctive or other relief as the Court may deem just and proper.

DATED: December 30, 2010

/s/Henry Rosen
HENRY ROSEN
JENNIFER L. GMITRO
ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

KEVIN L. MURPHY (KBA #50646)
GRAYDON HEAD & RITCHEY LLP
2400 Chamber Center Drive, Suite 300
Ft. Mitchell, KY 41017
Telephone: 859/578-3060
859/578-3061 (fax)

Liaison Counsel

EXHIBIT INDEX FOR [PROPOSED] SECOND AMENDED CONSOLIDATED COMPLAINT FOR VIOLATIONS OF § 11 OF THE SECURITIES ACT OF 1933

Exhibit No.	Description	Notes
1	Second Amended False Claims Act Complaint, *Kammerer v. Omnicare, Inc.*, No. 05-11518-RGS (D. Mass. Dec. 5, 2008);	
2	First Amended Complaint, *Maguire v. Omnicare, Inc.*, No. 02-cv-11436-RGS (D. Mass. June 21, 2005);	
3	Amended Complaint, *Lisitza v. Omnicare, Inc.*, No. 01 C 7433 (N.D. Ill. Jan. 23, 2003);	
4	Attorney General Tony West's Remarks on FY 2010 False Claims Act Recoveries, November 22, 2010;	
5	November 3, 2009 DOJ Press Release, "Nation's Largest Nursing Home Pharmacy and Drug Manufacturer to Pay $112 Million to Settle False Claims";	
6	Complaint of the United States, *United States of America, ex rel. Lisitza and Kammerer v. Johnson & Johnson*, No. 07-10288-RGS (Docket No. 81) (D. Mass. Jan. 15, 2010);	

Exhibit No.	Description	Notes
7	September 25, 2001 Omnicare—Current Analysis & Recommendations. JNJ 298613-16;	DOJ Ex. 52 [1] (81-53)
8	April 1997 Supply Agreement Between Omnicare and Johnson & Johnson Health Care Systems Inc. ("J&JHCS"). JNJ 001083-120;	DOJ Ex. 10 (81-11)
9	June 12, 1997 Memorandum from Mark E. Lehman to Omnicare Regional Clinical Directors attaching draft of Risperdal PSTI Protocol. OMNI-MA 035232-48;	DOJ Ex. 44 (81-45)
10	April 1999 Supply Agreement Between Omnicare and J&JHCS. JNJ 001026-51;	DOJ Ex. 15 (81-16)
11	July 19, 1999 Omnicare Memorandum Prepared by Bruce Cummins, JNJ 301370-405;	DOJ Ex. 12 (81-13)
12	Complaint of the United States, *United States of America, ex rel. Resnick v. Omnicare, Inc.*, No. 06-cv-10149-RGS (D. Mass. Mar. 4, 2009);	

[1] "DOJ Ex." refers to exhibits attached to the Complaint of the United States, *United States of America, ex rel. Lisitza and Kammerer v. Johnson & Johnson*, No. 07-10288-RGS (Docket No. 81) (D. Mass. Jan. 15, 2010) (attached as Ex. 6 hereto).

Exhibit No.	Description	Notes
13	Fifth Amended Complaint, *United States of America and the States of Florida and Illinois, ex rel. v. Omnicare, Inc.*, No. 07-C-5777 (N.D. Ill. Dec. 21, 2010);	
14	August 12, 2003 E-mails re DXL LVQ Pricing Update 7-08 PowerPoint attachment. JNJ 284627-55;	DOJ Ex. 2 (81-3)
15	November 11 & 25, 2003 E-mails re Ditropan XL LTC Contract. JNJ 284585-86;	DOJ Ex. 3 (81-4)
16	Letter from Charles G. Atkins of Strauss & Troy, on behalf of David Kammerer, to the U.S. FDA and U.S. Dept. of Health & Human Services re Omnicare, dated June 25, 2003;	
17	March 10, 2003 Omnicare Memorandum Prepared by Chuck Chartier and Matt Lawrence. JNJ 351924-56;	DOJ Ex. 1 (81-2)
18	June 1, 2000 Omnicare Physician Authorization Letter Template. OMNI 127541-45;	DOJ Ex. 48 (81-49)
19	Settlement Agreement between the State of Michigan and Omnicare, Inc. (2006);	

Exhibit No.	Description	Notes
20	Settlement Agreement between DOJ and Omnicare, Inc. (2006);	
21	E-mails from Bruce Cummins re Omnicare Rebate Dilemma. JNJ 011360-65;	DOJ Ex. 18 (81-19)
22	February 1, 1999 J&JHCS Amendment to Supply Agreement with Omnicare. JNJ 001078-80;	DOJ Ex. 11 (81-12)
23	August 25, 1998 Memorandum from Mark E. Lehman to Omnicare Consultant Coordinators and Formulary Champions attaching an updated and revised edition of the Risperdal PSTI (Patient Specific Therapeutic Interchange) Protocol. OMNI-PA 0438698, OMNI-MA 881939-60;	DOJ Ex. 45 (81-46)
24	Consulting and Services Agreement Payment Schedule, 3Q00-1Q04. JNJ 063067;	DOJ Ex. 32 (81-33)
25	Consulting Services Agreement between Omnicare and J&JHCS 7/1/2000-4/1/2004, signed October 2000. JNJ 001015-18;	DOJ Ex. 28 (81-29)
26	Omnicare Profile for 2Q 2000. JNJ 06?068;	DOJ Ex. 27 (81-28)

Exhibit No.	Description	Notes
27	J&JHCS Amendment to Supply Agreement, dated October 1, 2000. JNJ 002617-19;	DOJ Ex. 29 (81-30)
28	July 8, 19 & 22, 2002 E-mails re OmniCare Contract—Sporanox. JNJ 347031-33;	DOJ Ex. 8 (81-9)
29	June 15, 1999 Letter from Timothy E. Bien to Bruce Cummins. OMNI-MA 778063-64;	DOJ Ex. 43 (81-44)
30	January 2002, Long-Term Care ("LTC") Group Monthly Report. JNJ 291257-63;	DOJ Ex. 51 (81-52)
31	April 16, 2003 Letter from Janssen Pharmaceutica Inc. to Healthcare Providers;	
32	November 23, 2001 Memorandum from Mark E. Lehman to Omnicare Operations Mangers re Risperdal Fax Campaign. OMNI-MA 766303-04;	DOJ Ex. 47 (81-48)
33	July 2001 LTC Group Monthly Report. JNJ 289772-74;	DOJ Ex. 50 (81-51)
34	June 19, 21 & 28, 2002 E-mails re Omnicare Levaquin initiative. JNK 284391-92;	DOJ Ex. 49 (81-50)
35	1998/1999 Rebate—Omnicare JJHCS Contract. JNJ 301302;	DOJ Ex. 20 (81-21)

Exhibit No.	Description	Notes
36	PowerPoint Presentation re Omnicare 2000 Business Plan. OMP 004127-32;	DOJ Ex. 22 (81-23)
37	Omnicare Company Profile. JNJ 301791;	DOJ Ex. 46 (81-47)
38	June 19 & 21, 2002 E-mails re Omnicare Levaquin Initiative;	DOJ Ex. 53 (81-54)
39	December 15, 1999, LTC Group Update to MCC. JNJ 289711-38;	DOJ Ex. 4 (81-5)
40	February 7 & 9, 2003 E-mails re Omnicare Levaquin Profitability Model. JNJ 351497-98;	DOJ Ex. 13 (81-14)
41	Complaint of the United States, *United States of America, et al, ex rel. Kammerer v. Omnicare, Inc. and Ivax Pharms., Inc.*, No. 05-cv-11519-RGS (D. Mass. Mar. 4, 2009); and	
42	Omnicare, Inc. Original Reported Financial Results vs. Actual Financial Results Summary Schedule.	

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACUUSSETTS

[Filed December 5, 2008]

Civil Action No. 05-11518-RGS

UNITED STATES OF AMERICA *ex rel*
DAVID M. KAMMERER;

STATE OF CALIFORNIA *ex rel.*
DAVID M. KAMMERER;

STATE OF DELAWARE *ex rel*
DAVID M. KAMMERER;

DISTRICT OF COLUMBIA *ex rel.*
DAVID M. KAMMERER;

STATE OF FLORIDA *ex rel.*
DAVID M. KAMMERER;

STATE OF GEORGIA *ex rel.*
DAVID M. KAMMERER;

STATE OF HAWAII *ex rel.*
DAVID M. KAMMERER;

STATE OF ILLINOIS *ex rel.*
DAVID M. KAMMERER;

STATE OF INDIANA *ex rel.*
DAVID M. KAMMERER;

STATE OF LOUISIANA *ex rel.*
DAVID M. KAMMERER;

STATE OF MASSACHUSETTS *ex rel.*
DAVID M. KAMMERER;

STATE OF MICHIGAN *ex rel.*
DAVID M. KAMMERER;

STATE OF NEVADA *ex rel.*
DAVID M. KAMMERER;

STATE OF NEW HAMPSHIRE *ex rel.*
DAVID M. KAMMERER;

STATE OF NEW MEXICO *ex rel.*
DAVID M. KAMMERER;

STATE OF NEW YORK *ex rel.*
DAVID M. KAMMERER;

STATE OF TENNESSEE *ex rel.*
DAVID M. KAMMERER;

STATE OF TEXAS *ex rel.*
DAVID M. KAMMERER;

STATE OF VIRGINIA *ex rel.*
DAVID M. KAMMERER;

and

DAVID M. KAMMERER, individually,

Plaintiffs,

vs.

OMNICARE, INC.
1600 River Center II
100 East River Boulevard Center
Covington, Kentucky 41011

And

ABBOTT LABORATORIES
100 Abbott Park Rd.
Abbott Park, IL 60064-3500,

And

ALZA CORPORATION
1900 Charleston Road
P.O. Box 7210
Mountain View, CA 94039,

And

ASTRA ZENECA PHARMACEUTICALS
1800 Concord Pike
P.O. Box 15437
Wilmington, DE 19850-5437,

And

BARR PHARMACEUTICALS
2 Quaker Road
PO Box 2900
Pomona, NY 10970,

And

BAYER CORPORATION
100 Bayer Road, Building 4
Pittsburgh, PA 15205-9741,

And

ELI LILLY AND COMPANY
Lilly Corporate Center
Indianapolis, IN 46285,

And

GLAXOSMITHKLINE
200 North 16th Street
Philadelphia, PA 19102,

And

HOFFMAN -LAROCHE, INC.
340 Kingsland Street
Nutley, NJ 07110,

And

JOHNSON & JOHNSON
1 Johnson & Johnson Plaza
New Brunswick, NJ 08933,

And

MERCK & CO., INC.
One Merck Drive
P.O. Box 100
Whitehouse Station, NJ 08889-0100,

And

NOVARTIS CORPORATION
608 Fifth Avenue
New York, NY 10020,

And

NOVO NORDISK, INC.
100 College Road
West Princeton, NJ 08540,

And

PHARMACIA CORP.
235 East 42nd Street
New York, NY 10017,

And

PFIZER, INC.
235 E 42nd Street
New York, N.Y. 10017-5703,

And

WYETH-AYERST
5 Giralda Farms
Madison, NJ 07940,

Defendants,

JURY DEMAND

SECOND AMENDED FALSE CLAIMS ACT
COMPLAINT AND DEMAND FOR JURY TRIAL

I. INTRODUCTION

1. This is an action brought pursuant to the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, and pursuant to the false claims laws of seventeen states and the District of Columbia (hereinafter collectively referred to as "the FCA"), by the relator, David M. Kammerer, in his own capacity and on behalf of the United States of America and the states of California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana Louisiana, Massachusetts, Michigan, Nevada, New Hampshire, New Mexico, New York, Tennessee, Texas, Virginia, and the District of Columbia. This action seeks treble damages and civil penalties on behalf of the federal government and the state government plaintiffs arising from the defendants': (i) conspiracies to get false or fraudulent claims paid by the federal-state Medicaid program (Title XIX of the Social Security Act) in all states in which Omnicare does business; (ii) causation and making of false claims presented to federal and state officials and employees administering these Medicaid programs and other federal health programs; (iii) the causation, making and use of false records to get such false claims paid; and, (iv) the making of false statements to avoid an obligation to pay funds owed to these Medicaid Programs pursuant to the Medicaid Rebate Program, codified at 42 U.S.C. § 1396r-8.

2. The Complaint alleges a series of illegal transactions in which the defendants other than Omnicare, Inc. (referred to herein as the "pharmaceuticals manufacturer defendants") paid remuneration, in the form of concealed "post-purchase discounts" and rebates, as well as free goods, price-freezes, grants and other cash payments, to defendant Omnicare, Inc. ("Omnicare"), to induce Omnicare to purchase their

patented, brand name pharmaceutical drugs and increase purchases of their drugs compared to competing drugs. Defendant Omnicare, headquartered in Covington, Kentucky, provides pharmaceutical services and distributes pharmaceuticals primarily for long-term care facilities and nursing homes throughout the United States. Relator alleges that Omnicare took affirmative steps to increase the sales of these companies' products vis-à-vis competing drugs as a direct result of these illegal inducements, including substituting drugs for those prescribed without proper physician authorization as required under state law. Relator further alleges that Omnicare and the drug manufacturer defendants took affirmative steps to conceal from federal and state government auditors the illegal remuneration alleged herein; for instance, Omnicare executives requested, and the drug manufacturer defendants agreed to send false invoices to Omnicare pharmacies that left off the existence and terms of the rebates and "post purchase discounts." In addition, the drug manufacturer defendants did not disclose their grants and other cash and in-kind remuneration on the invoices sent to Omnicare.

3. As a result of these secret and illegal transactions, the pharmaceutical company defendants violated the FGA by knowingly: (i) causing Omnicare to submit claims to state and federal officials administering the Medicaid program that were false because Omnicare, as a recipient of illegal kickbacks from the drug manufacturers, was ineligible to seek payment of Medicaid funds; (ii) causing Omnicare to submit claims to these Medicaid officials that were false because the billed-for drugs had not been dispensed or prescribed in accordance with federal and state law, but rather had been dispensed as a result of

Omnicare's illegal substitution of drugs for physician-prescribed drugs or had been prescribed as a result of Omnicare's false or misleading representations to physicians regarding the drugs; (iii) conspiring with Omnicare to get the foregoing false or fraudulent claims paid by the federal-state Medicaid program; (iv) creating false records—such as inflated invoices that failed to disclose the post-purchase discounts and rebates, and the cash grants and other remuneration paid to Omnicare to induce purchases of the drug—to further the conspiracy to defraud the Medicaid program; and (v) making false statements to Medicaid concerning their best prices to customers to avoid payment of rebates owed Medicaid under the Medicaid Rebate Program, 42 U.S.C. § 1396r-8, and making false statements to, other government payers concerning their best prices to get false claims paid.

4. As a result of the illegal transactions described above, defendant Omnicare violated the FCA: (i) submitting claims to state and federal officials administering the Medicaid program that were false because Omnicare, as a recipient of illegal kickbacks from the drug manufacturers, was ineligible to seek payment of Medicaid funds; (ii) submitting claims to these Medicaid officials that were false because the billed-for drugs had not been dispensed or prescribed in accordance with federal and state law, but rather had been dispensed as a result of Omnicare's illegal substitution of drugs for physician-prescribed drugs or had been prescribed as a result of Omnicare's false or misleading representations to physicians regarding the drugs; (iii) conspiring with the drug manufacturer defendants to get the foregoing false or fraudulent claims paid by the federal-state Medicaid program; and (iv) causing, assisting and using false records to get false claims paid—such as the invoices prepared

by the drug manufacturer defendants that failed to disclose the post-purchase discounts and rebates, and the cash grants and other remuneration paid to Omnicare to induce purchases of drugs.

* * *

III. THE PARTIES

QUI TAM PLAINTIFF DAVID KAMMERER

10. Qui Tam Plaintiff David M. Kammerer ("Relator" or "Kammerer"), a citizen and resident of the State of Ohio, brings this action on his own behalf, as well as on behalf of the United States, pursuant to 31 U.S.C. § 3730(b)(1), and on behalf of the state plaintiffs, pursuant to the state false claims statutes set forth herein. Prior to filing this action, Relator, David M. Kammerer, on multiple occasions has provided the bulk of the information herein alleged to the United States, in particular, during interviews on June 2, 2003 and July 8, 2003, Kammerer disclosed to Special Agent Torn Harkness of the Food and Drug Administration and to Special Agent James J. O'Leary, Special Agent for the Office of Inspector General of the United States Department of Health & Human Services, that numerous pharmaceutical companies paid Omnicare concealed rebates and discounts to induce Omnicare to grant preferential treatment to the manufacturers' drugs. In a contemporaneous letter, on June 25, 2003, Kammerer through counsel sent a letter to Special Agents Harkness and O'Leary. In that letter, and in attachments to that letter, Kammerer specifically disclosed to these public officials that Omnicare forecasted profit based on the degree to which Omnicare managed to switch customers over from one drug to a competing drug, and that Omnicare actively worked to increase the market

share of these certain drugs at the expense of the drugs' competitors. Moreover, the spreadsheets submitted with the disclosure letter specifically confirmed what Kammerer had told Special Agents Harkness and O'Leary: that Omnicare was paid special rebates by manufacturers in exchange for increasing the market share of their drug over the market share of their competitors. In these disclosures, Kammerer further disclosed that "PAL [physician authorization letters] were used to help facilitate moving market share . . . from one drug to another drug that has equivalent therapeutic effects." June 25, 2003, Letter from Charlie Atkins, Esq. to Thomas G. Harkness and James J. O'Leary. Special Agents Harkness and O'Leary were at the time among the lead government investigators looking into the truth or falsity of claims submitted by Omnicare and its pharmaceutical manufacturer suppliers. In August 2003, Relator specifically alleged violations of the federal False Claims Act and state false claims laws as a result of Omnicare's steering patients and physicians towards certain drugs at the expense of competing drugs solely in order to increase its own profits.

11. Relator holds both BA and MBA degrees. He was an employee of Omnicare from September 1997 until his resignation in April 2002. Relator began his employment as a financial analyst for Tim Bien, RPh., FASCP, Omnicare Senior VP Purchasing & Professional Services. Relator was responsible for preparing spreadsheets and performing other types of financial analysis to evaluate potential "profit opportunities" which upper management proposed to achieve through Omnicare purchasing initiatives, clinical initiatives, and Medicaid reimbursement. It was routine for Relator to develop models of these profit

opportunities for upper management and then to forecast profitability as the model caused shifts in market share from drug A to drug B (*i.e.*, shifts in the amount of a given drug sold by Omnicare as a percentage of the total sales by Omnicare of that drug and its competitors), or shifts in the prescribed dose forms of a particular drug. These models also took into account the inducements that would be paid by different manufacturers if Omnicare committed to buy exclusively from the manufacturer or to increase the manufacturer's market share vis-à-vis its competitors.

12. In October 2000, Omnicare promoted Relator to Director of Medicaid Reimbursement. In this position, at the direction of upper management, Relator also performed financial analysis of: (i) the impact of the changes in the various states' Medicaid reimbursement policies on Omnicare profits, and (ii) the methods proposed by upper management to mitigate any negative impact on the company's profitability from such changes.

13. The alleged transactions set forth herein are based upon the direct and personal knowledge of the Relator as a former insider within Omnicare's corporate headquarters.

14. Kammerer has not based his Complaint upon any prior public disclosures of the allegations or transactions in a criminal, civil, or administrative hearing, lawsuit or investigation or in a Government Accounting Office or Auditor General's report, hearing, audit, or investigation, or from the news media. His lawsuit is derived solely from his position as an Omnicare insider. Moreover, even if his lawsuit were deemed to be based upon a public disclosure, he is an original source under 31 U.S.C. § 3730(e)(4), and other state whistleblower statutes as hereinafter

alleged. He has direct and independent knowledge of the information upon which the allegations are based and has voluntarily provided the information to the government before filing this qui tam action based upon that information.

* * *

IV. GOVERNING LAW

(A) Federal Health Care Program Anti-Kickback Statute/State Anti-Kickback Laws

32. The Federal Health Care Program Anti-Kickback Statute, enacted as Section 1128B(b) of the Social Security Act, 42 U.S.C. § 1320a-7b, prohibits persons from paying, soliciting or receiving illegal remunerations in order to induce business reimbursable under federal or state health care programs (here, Medicaid). 42 U.S.C. § 1320a-7b(a). The types of remuneration covered specifically include kickbacks, bribes, and rebates, whether made directly or indirectly, overtly or covertly, in cash or in kind. 42 U.S.C. § 1320a-7b(b). The prohibited conduct includes remuneration intended to induce referrals of patients or the purchasing, leasing or ordering, or arranging of any good, facility, service or item to be paid for by Federal or State health care programs. *Id.*

* * *

(B) Medicaid Reimbursement for Pharmaceutical Drugs

33. As a condition of paying part of the claims submitted to a state Medicaid program, the federal government requires states to pay pharmacies no more than the lower of their "estimated acquisition cost plus reasonable dispensing fee" or their "usual and customary charge to the general public" for:

i) drugs other than "multiple source drugs" for which the federal government has established a specific Medicaid payment limit under 42 C.F.R. § 447.332, and ii) any brand name drug that a physician has certified in his or her own handwriting as being medically necessary for a particular recipient. 42 C.F.R. § 447.331(b). To arrive at an "estimated acquisition cost" most states look to the drug's Average Wholesale Price ("AWP"), as set forth in industry publications. State Medicaid programs require pharmacies to state their "usual and customary charge" to the "general public" on their bills to Medicaid.

(C) Medicaid Rebate Program

34. With limited exceptions, the Omnibus Budget Reconciliation Act of 1990, 42 U.S.C. § 1396a-v, requires a pharmaceutical company to enter into a "rebate agreement" with the U.S. Secretary of Health and Human Services in order to qualify any covered, outpatient prescription drug manufactured by the company for Medicaid payment. 42 U.S.C. § 1396r-8(a)(1). Compliance with this rebate agreement is a material condition precedent to Medicaid's agreement to pay claims for the drug. *Id.* The rebate agreement requires each of these drug manufacturers to pay a quarterly rebate directly to each participating state Medicaid program for each of the manufacturers' drugs purchased by that state under its Medicaid plan during the quarter. The rebate must be equal to the difference between the average manufacturer's price (AMP) and the manufacturer's best price, defined as the lowest price available, anywhere in the nation, from the manufacturer to any non-Medicaid payer, or 15.1% of AMP, whichever is greater. 42 U.S.C. § 1396r-8(c)(1). Manufacturers selling covered, outpatient drugs paid for by state Medicaid programs

must report their AMPs and best prices to the state Medicaid programs on a quarterly basis. 42 U.S.C. § 1396r-8(b)(3). The Office of Inspector General of the Department of Health & Human Services has the right to audit the "best price" and "average manufacturer's price" information submitted by the manufacturers. *Id.* The state Medicaid programs report their total Medicaid drugs dispensed in the quarter to each drug manufacturer and the Secretary. 42 U.S.C. § 1396r-8(b)(2)(A). The Centers for Medicare & Medicaid Services ("CMS") computes the amount of the rebate that may be applied by each state program and the states use this information to notify and invoice each drug manufacturer for the quarterly rebate due.

(D) Federal Supply Schedule

35. The federal General Service Administration (GSA) negotiates Federal Supply Schedule (FSS) prices with drug companies with the goal of achieving for government agencies purchasing pharmaceutical drugs the "best price" that the companies offer their most favored customers; in order to contract with the government to have a drug listed on the FSS, the GSA consequently requires drug companies to disclose to GSA their best prices to commercial customers, including all discounts and other price concessions. 48 C.F.R. § 538.270. GSA will demand the "best price" for the FSS contract price unless it concludes that "the prices offered to the Government are fair and reasonable, even though comparable discounts were not negotiated." *Id.* In addition, companies with a good listed on the FSS must agree to agree to reduce their FSS price for the good if they lower their prices to commercial customers during the contract term in a manner that adversely affects the relationship

between the FSS price and the comparable commercial prices relied upon by the government in establishing the FSS price. *See* 48 C.F.R § 538.272.

(E) Pharmacy Provider Agreements

36. In order for a pharmacy to be eligible to bill and obtain payment from Medicaid, the state Medicaid programs require the pharmacy to abide by applicable federal and state law, including federal and/or state anti-kickback law. For example, in Illinois, in order to bill Medicaid, a pharmacy must first enter into an agreement in which it acknowledges that "compliance with such laws and handbook provisions [regarding services] is a condition of payment for all claims submitted." (Agreement For Participation in the Illinois Medical Assistance Program (available at: http://www.dpaillinois.com/enrollment/)). The referenced handbook provides in turn as follows: "Providers are subject to State and federal laws pertaining to penalties for vendor fraud *and kickbacks*." Handbook for Providers of Medical Services, Chapter 100—General Policy & Procedures, Section 136 (available at: http://www.dpaillinois.com/handbooks/chapter100.html). (Emphasis added.) In Michigan, pharmacies billing Medicaid agree to comply with the policies and procedures for the Michigan Medical Assistance Program contained in the Medicaid Provider Manual. Medical Assistance Provider Enrollment & Trading Partner Agreement (available at: http://www.michigan.gov/mdch/0,1607,7-132-2945_5100-43782--,00.html). The Michigan Provider Manual expressly states that "receiving kickbacks" is an example of prohibited "Medicaid fraud." Michigan Department of Community Health Medicaid Provider Manual, pp. 40-41 (available at: http://www.michigan.gov/som/0,1607,7-192-29929-87572--,00.html). In Florida, pharmacies

agree that they must be in compliance with federal, state and local law before Florida "may make payments for medical assistance." Florida Non-Institutional Medicaid Provider Agreement (available at: https://flmedprovenroll.com/provenroll/Jsp/checklist.html). The Provider Handbook then sets forth the Florida Anti-Kickback Statute as an example of a law with which providers must comply. Agency for Health Care Administration Florida Medicaid Provider General Handbook, Chapter 2, pg. 42. (available at: http://floridamedicaid.acs-inc.com/index.jsp?display=handbooks).

(E) Medical Practice Act Requirements

37. As a general matter, pursuant to state laws, drugs requiring a prescription under federal or state law may only be dispensed by a licensed pharmacist acting upon a lawful prescription issued by a licensed physician. In short, pharmacists are not authorized under the law to prescribe either a type, form or dosage of a controlled substance. Such prescriptions must be made by physicians based upon their independent, professional judgment.

(F) The Federal False Claims Act

38. The federal civil False Claims Act ("federal FCA"), 31 U.S.C. §§ 3729 *et seq.*, imposes civil liability, *inter alia*, on any person who: i) knowingly presents or causes to be presented to the United States false or fraudulent claim for payment or approval; (2) knowingly makes, uses or causes to be made or used a false statement to get a false claim paid or approved by the United States; (3) conspires to defraud the government by getting a false or fraudulent claim allowed or paid; or, (4) knowingly makes, uses or causes to be made or used a false statement to conceal,

avoid or decrease an obligation to pay or transmit money to the United States. The federal FCA defines "knowingly" to include not only acting with actual knowledge of the truth or falsity of claims, but also acting with "reckless disregard" or "deliberate ignorance" of the truth or falsity of claims. The federal FCA provides a remedy of treble damages and mandatory penalties of $5,500 to $11,000 for each violation of the Act. Pursuant to the federal FCA's so-called "qui tam provision," 31 U.S.C. § 3730(b), private individuals may bring suit on their own behalf as well as on behalf of the United States to recover damages and penalties for the United States. With certain exceptions set forth in the Act, the federal FCA provides that the private plaintiff, the so-called "qui tam plaintiff" or "relator", shall receive 15 to 25% of the government's recovery if the government intervenes in the case, or 25 to 30% if the qui tam plaintiff litigates the case on his or her own after a government declination.

(G) State False Claims Laws

39. The State plaintiffs herein have enacted similar laws that permit a private person to bring suit on behalf of the state to recover damages from persons that knowingly submit false claims to the state or engage in related misconduct, and that provide for rewards for the private person if the state prevails in the action. The statutory cites to these laws are set forth herein.

V. THE FRAUDULENT TRANSACTIONS

(A) CONCEALED "MARKET SHARE" REBATES

40. For at least the last eight years, the pharmaceutical manufacturer defendants, in violation of federal and state anti-kickback law, have entered into

agreements with Omnicare to pay remuneration in the form of cash rebates (sometimes referred to within Omnicare as "post-purchase discounts") to Omnicare to induce Omnicare to increase its purchases of pharmaceutical drugs from the pharmaceutical manufacturer defendants. These agreements ordinarily set up a "tiered" rebate structure, with the amount of the available rebate on a drug (expressed as a percentage of the purchase price of the drug) increasing as Omnicare increased its purchases of the manufacturer's drug as a percentage of its total purchases of the drug and competing drugs used to treat the same condition. This was known as a "market share rebate." Less frequently, the amount of the rebate increased according to the absolute volume of Omnicare's purchases from the defendant drug manufacturer.

41. In exchange for these rebates, Omnicare took affirmative steps to shift its customers, including Medicaid customers, over to the drugs of the manufacturers paying the rebates. Thus, Omnicare's top executives pressured and directed staff in Omnicare pharmacies to do what was necessary to increase the market share of the drug in question. The following paragraphs in this Section 5 of the Complaint detail examples of the rebates that constituted illegal kickbacks under federal and state law.

Abbott Laboratories

42. In the fourth quarter of 2001, Abbott Labs paid Omnicare concealed discounts as follows: "upfront discount" and "post-purchasing" discounts of 6.0% total (equal to $269,700) on purchases of Flomax®; and an "upfront discount" of 88% (equal to $3,490,539) on purchases of K-Tab®, all in exchange for Omnicare's granting preferential treatment to these drugs

vis-a-vis its competitor drugs. Abbott Labs paid Omnicare similar inducements to favor Flomax and K-Tabs during other calendar quarters, and also paid Omnicare other illegal inducements with respect to other drugs. Relator further alleges that Omnicare, as a direct result of the inducements presented by the opportunities to earn these discounts, took affirmative steps to increase the market share of Abbott Lab drugs at the expense of competitor-drugs, including using PALs to support its dispensing of Abbott Lab drugs when a physician had, in fact, prescribed a different drug. In other words, Omnicare took steps to increase its purchase of these Abbott drugs as a percentage of Omnicare purchases of all drugs in the same competitive class of drugs.

AstraZeneca Pharmaceuticals

43. On April 13, 2000, AstraZenica, through its National Account Director, John J. Toth, Jr., knowingly offered Omnicare, through its Director of Purchasing, Dan Maloney, an agreement described as "highly confidential" pursuant to which Omnicare would be paid rebates of up to 13% calculated under a written formula that expressly based the level of the rebate on the market share that Omnicare "achieved" for AstraZeneca's drug Seroquel®. Thus, if Omnicare achieved less than a 5% market share for Seroquel vis-a-vis its competitor-drugs, then Omnicare received zero rebate, if Omnicare achieved more than a 5% market share for Seroquel, it received a 2.00% rebate, if it achieved more than a 10% market share for Seroquel, it received a 5.00% rebate, and so on, up to an agreement pursuant to which Omnicare would receive a 13.00% rebate if it achieved more than a 40.00% market share for Seroquel. This rebate was for an entire year, calculated quarterly. Relator

alleges that Omnicare accepted this proposal, and AstraZeneca and Omnicare then concealed these rebates from the federal-state Medicaid program. Relator further alleges that Omnicare took affirmative steps to increase Seroquel's market share at the expense of its competitor-drugs, as a direct result of this inducement, including using PALs to support its dispensing of Seroquel when a physician had, in fact, prescribed a different drug. In addition, through the communication described above, AstraZeneca offered Omnicare a 1.00% rebate in exchange for Omnicare's positioning Seroquel as the "Preferred First Line Atypical Anti-psychotic. Omnicare and Astrazeneca entered into similar agreements with regard to Seroquel during other years. Omnicare and Astrazeneca also entered into similar agreements with regard to other drugs. For example, internal Omnicare documents indicate that Astrazeneca, in the fourth quarter of 2001, paid Omnicare "post purchasing discounts" based on market share or other preferential treatment, in the following amounts for the following drugs: Seroquel, 10% ($2,985,985), and Zestril®, 50% ($9,794,130). In addition, in the fourth quarter of 2001, Astrazeneca paid Omnicare concealed "up front discounts" in the following amounts for the following drug: Nolvadex®, 13% ($419,657).

Bayer Corporation

44. On June 2, 1999, Bayer, through Market Manager Eric R. Anderson, knowingly reiterated its "Confidential" offer to provide Omnicare with rebates based on the market share that Bayer achieved for Bayer Corporation's Baycol® tablets vis-a-vis Baycol's competitor-drugs. Thus, after a six month start up period, Bayer would provide Omnicare with a 4% rebate if Omnicare achieved a market share between

2.0 and 5.00% for Baycol, a 8% rebate if Omnicare achieved a market share between 5.1% and 10.0% for Baycol, and so on, through an agreement to pay Omnicare a 27% rebate if it achieved a market share of 30.1% or higher for Baycol. Omnicare accepted this proposal, Bayer and Omnicare concealed these rebates from the federal-state Medicaid program, and Omnicare took affirmative steps to increase Baycol's market share at the expense of its competitor-drugs, as a direct result of this inducement, including using PALs to support its dispensing of Baycol when a physician had, in fact, prescribed a different drug. Shortly after this arrangement was finalized, to the best of Relator's recollection, Bayer issued a warning concerning Baycol which caused Omnicare to cease its sales of the drug. Omnicare and Bayer also entered into similar agreements with regard to other drugs, however. For example, internal Omnicare documents indicate that Bayer, in the fourth quarter of 2001, paid Omnicare a "post purchasing discount" based on market share or other preferential treatment, in the following amount for the following drug: Adalat® CC, 25% ($1,271,061). In addition, in the fourth quarter of 2001, Bayer paid Omnicare a concealed "up front discount" of 6% ($305,055) on purchases of Adalat CC.

Eli Lilly & Co.

45. In the fourth quarter of 2001, Eli Lilly & Co. paid Omnicare a concealed "post-purchasing" discount of 9.5% (equal to $9,874,262) on purchases of Zyprexa® in exchange for Omnicare's granting preferential treatment to Zyprexa vis-a-vis its competitor drugs. Eli Lilly paid Omnicare similar inducements to favor Zyprexa during other calendar quarters, and also paid Omnicare other illegal inducements with respect to other drugs. Omnicare, as a direct result of

the inducements presented by the opportunities to earn rebates, took affirmative steps to increase the market share of Eli Lilly drugs, including Zyprexa, at the expense of competitor-drugs, including using PALs to support its dispensing of Eli Lilly drugs when a physician had, in fact, prescribed a different drug.

Johnson & Johnson

46. On August 1, 1998, Johnson & Johnson and Omnicare knowingly entered into an agreement whereby Johnson and Johnson, after a six month start-up period, agreed to pay Omnicare rebates based on the market share that Onmicare achieved for Johnson & Johnson's Risperdal® tablets compared to Risperdal's drug-competitors. Omnicare would get a 5% rebate during the first six months. After six months, it would get a 6% rebate if it achieved a market share between 35% and 37% for Risperdal, 9% if it achieved a market share between 37% and 42%, and 11% if it achieved a market share above 42%. In addition, Johnson & Johnson agreed to pay Omnicare a cash equivalent 1% "corporate overlay." All rebates as well as the 1% corporate overlay were conditioned on Omnicare's: (i) giving Risperdal® the Selected position in its drug formulary over all other and competing anti-psychotic drugs, (ii) favoring Risperdal over all other available branded drugs, and (iii) informing physicians of Risperdal's® formulary position, so as to "enhance compliance with this Agreement". Johnson & Johnson and Omnicare concealed these rebates from the federal-state Medicaid program, and Omnicare took affirmative steps to increase Risperdal's market share at the expense of its competitor-drugs as a direct result of this inducement, including using PALs to support its dispensing of Risperdal when a physician had, in fact, prescribed a

different drug. Johnson & Johnson and Omnicare entered into similar agreements in other years with respect to Risperdal, and also entered into similar agreements with regard to other drugs. For example, in the fourth quarter of 2001, Johnson & Johnson paid Omnicare the following "post-purchasing" discounts on the following drugs, in exchange for Omnicare's granting preferential treatment to the drugs: 8% (equal to $ 2,282,609) on purchases of Duragesic®; 5% (equal to $326,003) on purchases of Ultram®; 14% (equal to $866,096) on purchases of Ditropan® XL; 2% (equal to $98,640) on purchases of Topamax®; 7% (equal to $231,897) on purchases of Reminyl®; 2% (equal to $51,956) on purchases of Aciphex®; and 2% (equal to $50,212) on purchases of Regranex®.

Merck & Co., Inc.

47. On or about May 3, 1999, Merck and Omnicare knowingly entered into an agreement concerning the drugs Prinivil®, Vasotec®, Prinzide®, Mevacor®, Zocor®, Tim-XE, Cozaar®, Hyzaar® and Fosamax® whereby rebates ranging from 5% to 28% could be obtained by Omnicare based upon market share increases brought about by its marketing efforts. These rebates were available only to "closed shop" Omnicare pharmacies which provided data to Merck as required by the agreement. Rebates were paid quarterly, in a single check representing the total of rebates earned by Omnicare for the period. Omnicare agreed not to undertake any program that, in any way, encouraged the practice of switching patients from any of the said drugs; any such action by Omnicare was declared a material breach of the agreement. All agreement information was deemed confidential and advance notice was required before any such information was required to be disclosed pursuant to

applicable law. Merck and Omnicare concealed these rebates from the federal-state Medicaid program. Omnicare, as a direct result of the inducements presented by the opportunities to earn rebates, took affirmative steps to increase the market share of the aforementioned Merck drugs at the expense of competitor-drugs, including using PALs to support its dispensing of these drugs when a physician had, in fact, prescribed a different drug. Merck entered into similar agreements with Omnicare with regard to the aforementioned drugs in other years.

Novartis

48. In the fourth quarter of 2001, Novartis paid Omnicare concealed discounts as follows: "upfront discount" and "post-purchasing" discounts of 8.0% total (equal to $1,068,955)) on purchases of Miacalcin®; "up-front" and "post-purchasing" discounts of 15% total (equal to $1,509,117) on purchases of Exelon®; an "upfront discount" of 13% (equal to $1,035,489) on purchases of Clozaril®; and, a "post-purchasing" discount of 1.1% (equal to $38,142) on sales of Trileptal®, all in exchange for Omnicare's granting preferential treatment to these drugs vis-a-vis their competitor drugs. Novartis paid Omnicare similar inducements to favor these drugs during other calendar quarters, and also paid Omnicare other illegal inducements with respect to other drugs. Omnicare, as a direct result of the inducements presented by the opportunities to earn these discounts, took affirmative steps to increase the market share of Novartis' drugs at the expense of competitor-drugs, including using PALs to support its dispensing of such drugs when a physician had, in fact, prescribed a different drug.

Novo Nordisk

49. In the fourth quarter of 2001, Novo Nordisk paid Omnicare concealed discounts as follows: "upfront" and "post-purchasing" discounts of 53.2.0% total (equal to $2,223,211)) on purchases of Novolin N®; "up-front" and "post-purchasing" discounts of 53.20% total (equal to $2,113,554) on purchases of Novolin 70/30®; and "upfront" and "post-purchasing" discounts of 53.20% total (equal to $1,948,109) on purchases of Novolin R1®.

Pharmacia

50. In the fourth quarter of 2001, Pharmacia paid Omnicare concealed discounts as follows: a "post-purchasing" discount of 15.0% (equal to $4,074,093) on purchases of Celebrex®; a "post-purchasing" discount of 12% (equal to $838,171) on purchases of Ambien®; a "post-purchasing" discount of 13% (equal to $826,022) on purchases of Detrol®; a "post-purchasing" discount of 6% (equal to $292,892) on purchases of Xalatan®, a "post-purchasing" discount of 4% (equal to $92,598) on purchases of Mirapex®, a "post-purchasing" discount of 2% (equal to $36,588) on purchases of Zyvox®, and, a "post-purchasing" discount of 11% (equal to $244,587) on purchases of Fragmin®, all in exchange for Omnicare's granting preferential treatment to these drugs vis-a-vis their competitor drugs. Pharmacia paid Omnicare similar inducements to favor these drugs during other calendar quarters, and also paid Ominicare other illegal inducements with respect to other drugs. Omnicare, as a direct result of the inducements presented by the opportunities to earn these discounts, took affirmative steps to increase the market share of Pharmacia' s drugs at the expense of competitor-drugs, including using PALs to support its

dispensing of Pharmacia drugs when a physician had, in fact, prescribed a different drug.

(B) Grant Agreements, Management Meeting Funds And Other In-Kind And Cash Renumeration

51. Defendant Omnicare solicited from the drug manufacturer defendants, and the drug manufacturer defendants agreed to pay and did pay Omnicare illegal remuneration in exchange for inducing sales of their drugs to Medicaid customers under the guise of cash "grants" relating to the Omnicare "ReView" program. Omnicare maintained that its ReView program educated Omnicare pharmacists about the under-utilization of many drugs that could be beneficial for the elderly, which included, of course, the Medicaid-eligible population in the long term care facilities serviced by Omnicare pharmacies. Omnicare sought and received this grant money without making any representations to the defendants as to any costs that it had incurred in connection with the "ReView" program, or committing to perform specified work in exchange for these grants. Moreover, Relator witnessed his supervisor, Tim Bien, contact pharmaceutical companies and request and receive immediate injections of "grant money" on occasions when Joel Gemunder, Omnicare's CEO, was concerned that Omnicare's profits for the quarter otherwise would not satisfy Omnicare's investors.

52. The grant payments were ordinarily in round numbers. For example, the "grant amounts" contributed by the pharmaceutical manufacturer defendants during 2000 are shown in the following table:

OMNICARE REVIEW GRANTS

Pharmaceutical Mfg.	"Deposit"	Comment/ Total
ABBOTT LABS	$50,000; June 2000	$50,000
ALZA	$50,000; June 2000	$50,000
ASTRAZENECA	$75,000; June 2000	$75,000
BARR LABS	$10,000; March 2000	$10,000
BAYER	$10,000; Jan. 2001	$10,000
ELI LILLY	$50,000; June 2000	$50,000
GLAXOSMITHKLEIN	$50,000, April 2000	$50,000
HOFFMAN-LA ROCHE	$20,000—June 2000; $25,000—Aug. 2000	$45,000
JOHNSON & JOHNSON	$1,000—April 2000; $100,000 x 2—June 2000; $50,000—Aug. 2000	$251,000
MERCK	$25,000; July 2000	$25,000
NOVARTIS	$50,000; Sept. 2000	$50,000
NOVO NORDISK	$35,000; June 2000	$35,000
PHARMACIA	$50,000; June 2000	$50,000
PFIZER	$50,000; Aug. 2000	$50,000
WYETH-AYERST	$40,000—April 2000; $10,000—Nov. 2000	$50,000

53. The review program was a scheme that was entered into knowingly by Omnicare and the pharmaceutical manufacturer defendants to hide from Medicaid what were actually illegal kickbacks paid by the drug manufacturers to induce Omnicare to grant preferential treatment to their products over the products of their competitors. Omnicare and the drug companies hid these payments from the Medicaid

program, leaving them off the invoices sent by the drug manufacturer defendants to Omnicare pharmacies that purported to reflect the terms of sale. Omnicare agreed to and did grant preferential treatment to the products of these companies as a result of these grant payments.

54. Beginning at least as early as 1999, and continuing at least through 2001, the drug manufacturer defendants also paid remuneration to Omnicare to induce Omnicare's purchases of their drugs in the form of funds that were identified as ostensibly covering the costs of the attendance by the drug manufacturers at Omnicare's annual management meetings in Amelia Island. However, these payments varied in amount from manufacturer to manufacturer, bore no rational relationship to the costs of the conference, and were requested by Omnicare, and paid by the drug manufacturer defendants, in order to secure Omnicare's business.

55. On information and belief, the drug manufacturers offered and Omnicare accepted other forms of concealed cash and in-kind remuneration intended to secure Omnicare's business, including free product and various cash payments.

(C) THERAPEUTIC INTERCHANGE PROGRAM

56. Internally, Omnicare used the term "therapeutic interchange" to characterize the schemes pursuant to which Omnicare took steps to increase a drug's market share at the expense of its competitors in order to earn the rebates and other cash inducements offered by the manufacturer. Omnicare misrepresented in a memo to its own Directors of Operations its motivation for the therapeutic interchange program. Thus, Omnicare Senior Vice

President Tim Bien stated there were: "several advantages to switching to the drug of choice; the drugs we have been switching to have the same or better efficacy; they save the payer money; and our costs go down. It is for these reasons that it's imperative we continue increasing our market share in the drug of choice." (May 21, 1999, Memorandum from Tim Bien to Directors of Operations, Re: Price Increase Opportunity." These "drugs of choice," however, were drugs subject to kickback arrangements, and increasing the market share of these drugs would not always "save the payer money." Bien also requested that the Directors of Operations increase their private pay prices on drugs that competed with the "drugs of choice" in order to help Omnicare reach its market share goals and to defray increased costs. This reference to "increase costs" was also misleading as Omnicare's costs for the other drugs had not increased.

57. Bien directed and pressured the managers of Omnicare pharmacies to increase their sales of Omnicare-favored drugs at the expense of non-favored competing drugs. One means employed by Omnicare to switch customers from a non-favored drug to a favored drug was the issuance by an Omnicare pharmacy of a "Physician Authorization Letter" or "PAL" to all physicians writing prescriptions for residents in facilities serviced by the pharmacy. The PAL stated that the pharmacy would substitute certain drugs for other drugs if the doctor signed the PAL authorizing the pharmacy to do so. In many instances, however, the PAL misrepresented the comparative costs and benefits of the drugs. In other instances, pharmacies would switch over customers to the preferred drug even in the absence of the prescribing physician signing the PAL. When the

switches were accomplished through misleading PALs, or without the written authorization of the prescribing physician, these methods often violated state law.

(D) FALSE STATEMENTS AND FALSE CLAIMS

1. False Statements to Medicaid regarding "Best Prices"

58. Kammerer alleges on information and belief that the pharmaceutical manufacturer defendants did not disclose these concealed market share and other rebates, and the purchase inducements disguised as grant and management conference funds, to the Medicaid program as required by the Medicaid Rebate Program or to the federal General Services Administration (GSA) as required of companies selling goods on the Federal Supply Schedule (FSS). For example, Kammerer alleges that the significant second Quarter 2001 rebates paid by defendants Abbott Laboratories, Astra Zeneca Pharmaceuticals, Eli Lilly & Co., Glaxo SmithKline, Johnson & Johnson, Merck & Co, Novartis Corp., Novo Nordisk, Inc. and Pharmacia Corp. on various products, which are set forth in Exhibit A hereto, were not disclosed to the Medicaid Program and the federal government in connection with these companies "best price" disclosures. Kammerer alleges on information and belief, that the pharmaceutical manufacturer defendants falsely represented to Medicaid and other federal government payers that their "best prices" were amounts that exceeded the post-rebate, dead net prices given to Omnicare. In doing so, they knowingly made false statements to avoid an obligation imposed by the Medicaid Rebate Program and other laws to pays funds to federal and state governments.

59. The bases for Kammerer's allegation in the immediately preceding paragraph include the following two facts: First while at Omnicare, Kammerer reviewed "best price" files on CMS's website that contained Federal Supply Schedule (FSS) prices, among other government prices, for many brand name drugs. In reviewing these files, Kammerer saw that, for many drugs, the FSS "best prices" were significantly higher than Omnicare's dead net cost for the same drugs for the same period of time. The federal General Service Administration negotiates FSS prices with drug companies with the goal of achieving for the government the "best price" that the companies offer their most favored customers, and requires drug companies to disclose their best prices to commercial customers, including all discounts and other price concessions. See 48 C.F.R. Part 538. Relator consequently concluded that, in those instances in which Omnicare's dead net cost is significantly lower than the FSS price, it is likely that that the drug manufacturers are withholding from government payers the deep post-purchase discounts and rebates provided to Omnicare. Second, while at Omnicare, Relator learned from Omnicare Senior Vice President Tim Bien that Omnicare and the drug manufacturers wished to keep the rebate information highly confidential for several reasons, including their desire to conceal the existence and amount of the rebates from government auditors. Accordingly, to further this goal, the pharmaceutical manufacturer defendants and Omnicare agreed that the manufacturers would not disclose the existence or terms of the rebates on the invoices sent to Omnicare pharmacies. Moreover, within Omnicare, the purchasing department shared information about Omnicare's true dead net cost for drugs with only a handful of top executives.

2. False Statements Conerning Terms of Sale

60. The defendant pharmaceutical manufacturers agreed with Omnicare not to disclose the existence or terms of the market share and other rebates on the invoices that they sent to Omnicare pharmacies to reflect the terms of sale. The invoices sent to the Omnicare pharmacies consequently contained false information regarding the terms of sale. The invoices sent by the drug manufacturer defendants to Omnicare were also false in that they did not reveal the Review grants and management conference payments and other cash and in-kind payments, which also were part of the terms of sale.

61. The defendant manufacturers created, and Omnicare caused and assisted the creation of these invoices that falsely recorded the terms of sale with full knowledge that the invoices were false. Moreover, Omnicare, with full knowledge that the invoices were inflated, used the invoices in its pharmacies as official records of the terms of sale.

3. False Statements on Provider Agreements

62. Omnicare knowingly made additional false statements on provider agreements submitted to the federal-state Medicaid programs; in particular, Omnicare agreed that it would comply with applicable federal and state laws, including anti-kickback law and the laws governing pharmacies and the practice of medicine, despite the fact that it knew it would not and could not comply with such laws as it had entered into kickback arrangements with the pharmaceutical manufacturer defendants, and was undertaking illegal therapeutic interchange schemes.

4. Purpose of False Statements

63. The foregoing false records were created and used in furtherance of the conspiracy between Omnicare and the defendant drug manufacturers to defraud the Medicaid program, to get false claims paid by the federal-state Medicaid program and other federal government payers, and to assist the defendant drug manufacturers avoid their obligation to pay rebates to Medicaid under the Medicaid Rebate Program.

5. False Claims for Medicaid Payment

64. A significant percentage of the Omnicare "drugs of choice" that Omnicare favored through its therapeutic interchange program in exchange for drug manufacturer rebates were sold to Medicaid beneficiaries and covered under the Medicaid program. To obtain payment for these drugs, Omnicare presented claims to the administrators of the federal-state Medicaid program employed by the states. The states paid Omnicare's claims, and presented claims to the federal government to obtain the federal share of the reimbursement that the states paid Omnicare. The Omnicare claims were false because Omnicare was ineligible for payment due to its receipt of illegal kickbacks and the illegal methods it employed to switch customers to its "drugs of choice." The state claims for federal share likewise were false in that they effectively passed on Omnicare's false claims and/or sought payment for the false claims of Omnicare.

65. The drug manufacturer defendants knowingly caused Omnicare to make these false claims for payment to the administrators of the federal-state Medicaid program, and knowingly caused the states to

submit false claims for federal funding. Omnicare knowingly submitted these false claims for payment to administrators of the state-federal Medicaid program, and knowingly caused the states to submit false claims for federal financing of Omnicare's false claims.

4. Conspiracy to get False or Fraudulent Claims Paid

66. Through the acts and omissions set forth above, Omnicare entered into separate conspiracies with each of the pharmaceutical manufacturer defendants to get false or fraudulent claims paid by the federal-state Medicaid program. Thus, with each pharmaceutical manufacturer defendant, Omnicare agreed to: (i) accept a financial payment in exchange for purchases of drugs from the manufacturer; (ii) use invoices to record the terms of sale that concealed the financial payment, and thereby assisted the drug manufacturers conceal the payment from state Medicaid programs and maintain the profit margin or "spread" they could offer Omnicare; and (iii) favor the drugs of the manufacturer over competitor drugs in exchange for the inducement by increasing its purchases of the drugs relative to competing drugs, refraining from switching customers over to competing drugs, and/or switching customers over to the drugs.

* * *

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Filed June 21, 2005]

Civil Action No. 02-cv-11436

THE UNITED STATES OF AMERICA ex rel. DEBORAH MAGUIRE, THE STATE OF CALIFORNIA ex rel. DEBORAH MAGUIRE, THE STATE OF DELAWARE ex rel. DEBORAH MAGUIRE, THE DISTRICT OF COLUMBIA ex rel. DEBORAH MAGUIRE, THE STATE OF FLORIDA ex rel. DEBORAH MAGUIRE, THE STATE OF HAWAII ex rel. DEBORAH MAGUIRE, THE STATE OF ILLINOIS ex rel. DEBORAH MAGUIRE, THE STATE OF LOUISIANA ex rel. DEBORAH MAGUIRE, THE COMMONWEALTH OF MASSACHUSETTS ex rel. DEBORAH MAGUIRE, THE STATE OF NEVADA ex rel. DEBORAH MAGUIRE, THE STATE OF NEW MEXICO ex rel. DEBORAH MAGUIRE, THE STATE OF NEW HAMPSHIRE ex rel. DEBORAH MAGUIRE, THE STATE OF TENNESSEE ex rel. DEBORAH MAGUIRE, THE STATE OF TEXAS ex rel. DEBORAH MAGUIRE, AND THE COMMONWEALTH OF VIRGINIA ex rel. DEBORAH MAGUIRE,

-and-

DEBORAH MAGUIRE, c/o Christopher B. Mead, Esquire, London & Mead, 1225 19th St., N.W., Suite 320, Washington, D.C. 20036,

Plaintiffs,

v.

OMNICARE INC., 1600 RiverCenter II, 100 East RiverCenter Blvd., Covington, KY 41011,

Defendant.

Filed December 30, 2010
Filed *In Camera* and Under Seal

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

DEBORAH MAGUIRE Plaintiff in the above-styled action, by and through her counsel of record, states that this is an action brought on behalf of the United States of America by DEBORAH MAGUIRE (hereinafter referred to as "Relator") against Omni Care Inc. (the "Defendant") pursuant to the *Qui Tam* provisions of the Federal Civil False Claims Act, 31 U.S.C. §§ 3729-33 ("Federal FCA" or "FCA"), and on behalf of the above named states under their respective State False Claims Acts listed below ("State FCAs") (together referred to herein as "*Qui Tam* Action"). Pursuant to 31 § 3730(b)(2), and comparable provisions in State FCAs, this action is brought in camera and under seal.

This lawsuit is based on a scheme by the Defendant and its subsidiaries to violate the Anti-Kickback Act, 42 U.S.C. § 1320A-7b(b)(2), by offering the services of pharmacy consultants at below market rates to nursing homes, skilled nursing facilities, and other long term care facilities ("LTCFs"). The offers of these pharmacy consultant services at below market rates induce LTCFS to enter into contracts allowing Omnicare, Inc. and its subsidiaries (collectively "Omnicare") to provide drug products to patients of those LTCFs, and to bill Medicaid and other payers for those drugs. Omnicare's pharmacy consultants review all medications taken by LTCF patients and

recommend different medications that result in greater profits to Omnicare, and, upon information and belief, also result in higher bills to Medicaid in many instances. Upon information and belief, Omnicare also followed a practice of falsely and fraudulently billing for more expensive, name brand drugs when it had actually provided generic versions of those drugs. Plaintiff Deborah Maguire alleges as follows:

* * *

FACTS AND ALLEGATIONS

Factual Allegations

13. 42 C.F.R. 483.60(a) requires LTCFs to "provide pharmaceutical services (including procedures that assure the accurate acquiring, receiving, dispensing, and administering of all drugs and biologicals) to meet the needs of each resident." 42 C.F.R. 483.60(b) and (c) provide that LTCFs

> must employ or obtain the services of a licensed pharmacist who—(l)Provides consultation on all aspects of the provision of pharmacy services in the facility; (2) Establishes a system of records of receipt and disposition of all controlled drugs in sufficient detail to enable an accurate reconciliation; and (3) Determines that drug records are in order and that an account of all controlled drugs is maintained and periodically reconciled.
>
> (c) Drug regimen review.
>
> (1) The drug regimen of each resident must be reviewed at least once a month by a licensed pharmacist. (2) The pharmacist must report any irregularities to the attending physician and the director of nursing, and these reports must be acted upon.

14. Omnicare's core business is to provide pharmaceutical services to LTCFs. Omnicare offers to take over all drug procurement, services, and billing for LTCFs. Omnicare offers the regulatorily-required pharmaceutical consultant services to LTCFs if those LTCFs allow Omnicare pharmacies to provide all drugs and certain other products to the patients of the LTCFs. Omnicare buys drugs from manufacturers, distributes the drugs to the LTCFs, and bills Medicaid and other payers for the drugs.

15. The Medicaid Program provides federal funds to the states to assist the poor, elderly, and disabled to receive medical care, prescription and non-prescription drugs, and related services. States may elect to opt in or out of the Medicaid Program. States that opt into the program must submit a State Plan ("Medicaid State Plan") to the United States Department of Health and Human Services ("DHHS") for approval, describing the policies and methods used to set reimbursement rates for each type of service included in the program. The provision of drugs, pharmaceuticals, and related services are one such type of service. Both the Medicaid State Plan and any amendments must meet federal requirements. 42 U.S.C. 1396a(a) and (b); 42 C.F.R. 430.10, 430.12.

16. Medicaid prescription drug reimbursement to pharmacies like Omnicare consists of two components: a formula to cover the cost of the prescription drug product and a dispensing fee. The drug product component cost is the cost of the drug as determined by a Medicaid formula which estimates the acquisition cost. Federal law requires that the dispensing fee paid to pharmacies be reasonable. 42 C.F.R. 447.331(b)(1).

17. Medicaid State Plans set reimbursement amounts for drug products, and also set dispensing fees.

18. Medicaid covers a large percentage of patients in LTCFs. Omnicare's Securities and Exchange Commission ("SEC") filings indicate that 44% of its reimbursements for pharmaceutical services come from Medicaid, with 3% coming from Medicare. Omnicare's Pharmacy Services segment recorded sales of over two billion dollars for the year ended December 31, 2001, indicating that Omnicare submits millions of claims to Medicaid each year, and receives hundreds of millions of dollars in reimbursements from the federal government each year.

19. Omnicare's SEC filings state that Omnicare's consolidated gross profit as a percentage of sales in the year ending December 31, 2001, was 26.8%. The only way Omnicare can make such profits on its core pharmaceutical services business is to ensure that Omnicare acquisition costs and distribution expenses stay significantly below the reimbursement levels Omnicare receives for drugs. The difference between Omnicare's acquisition costs versus reimbursement levels for particular drugs will be referred to hereafter as "the Spread."

20. Omnicare's offer to provide regulatorily-required pharmacy consultant services to LTCFs is a crucial part of Omnicare's business plan. The cost of paying a pharmacist to review medications of each patient every month, and to supervise drug distribution, is ordinarily a significant expense to LTCFs. Omnicare offers pharmaceutical services to LTCFs at below market rates as an inducement for LTCFs to sign pharmacy services contracts with Omnicare. Omnicare's offer of pharmacy consultant

services at below market rates, coupled with its offer to take over drug procurement, distribution, and billing, has allowed Omnicare to obtain pharmacy services contracts with thousands of LTCFs, to the point that Omnicare now serves more than 729,500 residents in 9,800 LTCFs. Omnicare has also built its patient base by acquiring other pharmacy services companies that market to nursing homes.

21. Omnicare's offer of pharmacy consultant services at below market rates as an inducement for LTCFs to sign pharmacy services contracts is a violation of the Anti-Kickback Act, 42 U.S.C. § 1320A-7b(b)(2). The Anti-Kickback Act forbids health care providers from offering goods or services at below-market rates as an inducement for referrals, recommendations, or arranging health care services reimbursable under Federal health care programs. The statute specifically provides:

> (2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—
>
> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,
>
> shall be guilty of a crime.

22. Once Omnicare's pharmacy consultants are in place at LTCFs, those consultants are in an advantageous position to recommend medications for patients of the LTCF. Regulations require the pharmacy consultants to review all medications prescribed for LTCF patients on a monthly basis, giving the consultants access to complete medication information for each patient. Physicians understand that such pharmacy consultants are expected to make recommendations to change prescriptions for patients if better or less expensive medications are available. Physicians are frequently inclined to follow recommendations from such consultants if they sound reasonable on their face. Physicians frequently are not aware of the reimbursement levels for drugs, and are inclined to accept recommendations from consultants when consultants say that the recommendations are based on cost considerations.

23. Omnicare has adopted and published a book of "Omnicare Guidelines," which rank specific drugs in therapeutic classes as preferred, acceptable or unacceptable. The Omnicare Guidelines provide cost information using a system of one to four stars for each drug. Upon information and belief, such general classifications on cost allow Omnicare to conceal reimbursement differentials between drugs that have the same number of "stars" in the cost rankings.

24. In addition to the "Omnicare Guidelines" for recommending drugs, Omnicare also engages in periodic "fax campaigns," where Omnicare headquarters sends faxes for distribution to all its pharmacy consultants recommending a certain drug for particular disease conditions. For example, in November, 2001, Omnicare identified all patients it serviced who were on "conventional" antipsychotic

medications, such as haloperidol, mesoridazine, thioridizine, and fluphenazine. Omnicare then faxed or called the physicians for each of those patients, recommending that the patients be switched to Risperdal, an "atypical" antipsychotic medication. Omnicare then required all its pharmacy consultants to follow up with doctors to recommend Risperdal. Omnicare said in a fax to its pharmacy consultants that "[i]t is imperative that each and every resident on a conventional antipsychotic be re-evaluated for appropriate conversion to an atypical antipsychotic, with Risperdal being the more cost effective GPCG 'preferred' alternative."

25. Omnicare hires pharmacists as independent contractors to provide pharmacy consultant services to LTCFs. On information and belief, Omnicare pays those pharmacy consultants more than it charges LTCFs for their services. On information and belief, Omnicare evaluates and compensates its pharmacy consultants based on the consultants' ability to successfully recommend drugs in conformity with Omnicare Guidelines and fax campaigns.

26. With a large patient population base serviced by its pharmacy consultants, Omnicare is in a position to negotiate favorable prices from drug manufacturers. On information and belief, Omnicare can offer more than large volume purchases as an inducement to drug manufacturers to cut their prices—Omnicare can promise that if a drug manufacturer will cut the price for a particular drug below a certain level, Omnicare will make that drug its "preferred" cost effective alternative for certain disease conditions. On information and belief, Omnicare promises that its pharmacy consultants will recommend that physicians switch prescriptions to the preferred cost

alternative drug, allowing Omnicare to promise that its consultants will drive up sales volume in exchange for lower prices. While volume discounts generally fall within the "safe harbors" to the Anti-Kickback Act, Omnicare's promises to recommend particular drugs through its pharmacy consultants go beyond ordinary volume purchasing decisions, and also constitute violations of the Anti-Kickback Act, because Omnicare is soliciting discounts as a condition for recommending particular drugs to physicians. 42 U.S.C. § 1320A-7b(b)(1) provides:

> (1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind
>
> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,
>
> shall be guilty of a crime.

In sum, Omnicare's financial incentive to maximize the spread between acquisition costs and reimbursement levels creates an inherent conflict of interest. Omnicare's consultants serve both as pharmacists and as a highly effective sales force.

27. As an additional inducement for LTCFs to sign pharmacy contracts with Omnicare, Omnicare offered staff services at no cost to provide hemodialysis on-site at LTCF facilities. Omnicare only offered no cost hemodialysis staff to LTCFs that entered into pharmacy contracts with Omnicare.

28. Upon information and belief, Omnicare also followed a practice of falsely and fraudulently billing for more expensive, name brand drugs when it had actually provided generic versions of those drugs.

29. By requiring its subsidiaries listed in paragraph 4 above, and other subsidiaries unknown to Plaintiff, to follow Omnicare corporate policies and guidelines for recommending particular drugs and billing for name brand drugs when cheaper generic versions had actually been provided, Omnicare has caused its subsidiaries to submit millions of false and fraudulent claims for reimbursement to Medicaid and Medicare.

30. As required by law, Relator has served a detailed Disclosure Statement and a Supplemental Disclosure Statement upon the United States and the State parties to this action. The Disclosure Statement provides additional details concerning the Defendant's conduct and Relator's basis of knowledge.

* * *

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed January 23, 2003]

No. 01 C 7433

CHIEF JUDGE KOCORAS
FILED UNDER SEAL
JURY TRIAL DEMANDED

UNITED STATES OF AMERICA *ex rel.*
BERNARD LISITZA, STATE OF ILLINOIS *ex rel.*
BERNARD LISITZA, STATE OF CALIFORNIA *ex rel.*
BERNARD LISITZA, STATE OF DELAWARE *ex rel.*
BERNARD LISITZA, DISTRICT OF COLUMBIA *ex rel.*
BERNARD LISITZA, STATE OF FLORIDA *ex rel.*
BERNARD LISITZA, STATE OF HAWAII *ex rel.*
BERNARD LISITZA, STATE OF LOUISIANA *ex rel.*
BERNARD LISITZA, STATE OF NEVADA *ex rel.*
BERNARD LISITZA, STATE OF TENNESSEE *ex rel.*
BERNARD LISITZA, STATE OF TEXAS *ex rel.*
BERNARD LISITZA, and BERNARD LISITZA, individually,

Plaintiffs,

v.

OMNICARE, INC.,

Defendant.

AMENDED COMPLAINT

January 23, 2003

Now comes the United States of America *ex rel.* Bernard Lisitza, the States of Illinois, California, Delaware, District of Columbia, Florida, Hawaii, Louisiana, Massachusetts, Nevada, Tennessee, and Texas, *ex rel.* Bernard Lisitza, and Bernard Lisitza, individually (collectively "plaintiffs"), stating as follows for their Complaint against OmniCare, incorporated:

I. INTRODUCTION

1. This is an action by both the United States of America and the State of Illinois, through the relator Bernard Lisitza, to recover treble damages and civil penalties arising from false statements and claims made or caused to be made by defendant OmniCare, Incorporated ("OmniCare") to the United States Government ("United States") and to the State of Illinois ("Illinois"; collectively known as the "government"), in violation of the federal False Claims Act, 31 U.S.C. §§3729-32, and the Illinois Whistleblower Reward and Protection Act, 740 ILCS 175.

2. OmniCare is a nationwide distributor of pharmaceuticals for nursing homes. OmniCare defrauded the government by changing prescriptions for a popular antacid from tablets to capsules in order to inflate government reimbursements by as much as 400%. The drug, ranitidine, is the generic form of the medication Zantac. For much of the past four years, it has been the second-most popularly prescribed medication in nursing homes.

3. Generic ranitidine comes in two forms: tablets, which are prescribed the most frequently, and

capsules, which are rarely prescribed. Because ranitidine tablets are prescribed so frequently, the Health Care Financing Administration ("HCFA") has set a Federal Upper Limit price for the tablets. (HCFA is now known as the Centers for Medicare & Medicaid Services.) Per Illinois Medicaid regulations, the Federal Upper Limit price is the maximum Illinois Public Aid will reimburse pharmacies that distribute ranitidine tablets.

4. Because the capsules are prescribed so infrequently, however, no Federal Upper Limit price exists. Instead, Illinois Public Aid reimburses for capsules at a prevailing market price determined by the state. The prevailing market price for ranitidine capsules typically runs from two to four times the Federal Upper Limit price for tablets.

5. Beginning in 2000 and continuing to the present, OmniCare took advantage of the discrepancy in reimbursement rates by systematically instructing its clerical staff to alter physician orders for ranitidine from tablets to capsules, in violation of state and federal law. Moreover, in order to create the appropriate conditions to illegally maximize their ranitidine reimbursement, OmniCare altered their computers to make it virtually impossible for data entry clerks to enter any prescription orders for ranitidine tablets. As further detailed below, OmniCare is liable for treble damages and penalties because they used this scheme to obtain reimbursement for over $10 million in false claims for inflated and unjustified costs.

* * *

IV. LISITZA'S EMPLOYMENT WITH OMNICARE

14. Plaintiff and relator Lisitza was employed by Jacobs HealthCare ("Jacobs") between 1992 and May 2001. Prior to 1992, Mr. Lisitza managed his own pharmaceutical distribution business. During his entire tenure with Jacobs, Mr. Lisitza was employed as a pharmacy supervisor, supervising several pharmacists filling orders for Jacobs' nursing home clients. In 1995, Jacobs was acquired by OmniCare and became part of OmniCare's nationwide pharmacy distribution network. Mr. Lisitza remained as a pharmacy supervisor, under OmniCare employment, until May 2001. As further detailed below, Mr. Lisitza was fired for questioning the false claims that are the subject of this action.

V. DEFENDANT'S KNOWING SUBMISSION OF FALSE CLAIMS

A. OmniCare's Government Business

15. OmniCare provides pharmaceuticals for thousands of elderly and disabled clients whose benefits are paid by the Government. Specifically, OmniCare receives millions of dollars annually as reimbursement from the Government for services funded under the Medicaid, Medicare, CHAMPUS, and other government third-payor health insurance programs.

16. At all times relevant to this action, OmniCare has been primarily engaged in providing pharmaceutical services to nursing homes through regional pharmaceutical centers. Many of OmniCare's pharmaceutical services are provided under contractual agreement with the state of Illinois through its Medicaid provider licensure program, whereby OmniCare agreed to provide pharmaceuticals to Illinois Medicaid patients in the nursing homes it serves, and

the Illinois Department of Public Aid ("IDPA") would reimburse OmniCare its costs plus a fixed dispensing fee, meant to provide OmniCare with a profit for providing services to Illinois Medicaid clients.

B. OmniCare's Scheme to Defraud the Government

17. Since 2000, on information and belief, OmniCare regularly inflated the amount of money billed for ranitidine, the generic form of the medication commercially known as Zantac and the second-most popular drug prescribed to nursing home clients. This ongoing practice involved thousands of relatively small transactions. Its execution is detailed in paragraphs 18-29 below.

18. OmniCare is supposed to bill for medications prescribed by physicians working onsite at the nursing homes for which OmniCare provides pharmacy services. OmniCare nursing home physicians give prescription orders to their nurses in writing or verbally. The nurses present the prescription orders verbally or by facsimile to OmniCare clerical data entry personnel to be entered into OmniCare's computerized order entry system. The verbal orders are also entered on "Physician Order Sheets" which are verified monthly by nursing home physicians in order to make sure proper care is being given.

19. When a prescription order is entered into OmniCare's order entry system, a pharmacist receives the order and fills it based on the physician's request. After a prescription order is filled by the pharmacist, the prescription is shipped to the nursing home facility where the patient resides.

20. At least once per day, each OmniCare facility batches its Medicaid claims and submits them electronically to IDPA. As part of each electronic claim,

OmniCare affixes its unique Medicaid provider identification number, which serves as an electronic stamp indicating that, as an Illinois Medicaid provider, OmniCare is in compliance with all applicable federal and state regulations. Claims are adjudicated instantaneously; OmniCare is given a chance to resubmit rejected claims and is reimbursed on a monthly basis by IDPA for all approved claims. Therefore, OmniCare makes representations and claims to the Government concerning Medicaid reimbursement on a daily basis.

21. In Illinois, Medicaid prescription claims are paid at the lower of two rates: (1) the pharmacy's prevailing charge to the general public or (2) the Illinois Department of Public Aid's maximum price plus an established dispensing fee. Generally, pharmacies can make more money on those medications for which IDPA has not set a maximum price.

22. Illinois sets maximum prices different than a pharmacy's prevailing charge to the general public for several frequently-prescribed medications in order to control Medicaid pharmacy program costs. When IDPA intends to set a maximum price for a frequently prescribed medication, it sets the price according to federal and state guidelines at a rate that allows the pharmacy distributor a small distribution fee.

23. The specific medication at issue in the instant case, generic ranitidine, has a maximum price different from the prevailing price for the tablet form only. Relator asserts that this is because capsules are appropriately prescribed so infrequently; they are generally only required for people who are intubated so they must receive medication dissolved in a solution through a nasal tube. Because the tablet form of

ranitidine is reimbursed at a maximum rate determined by federal and state regulations while the capsule form is reimbursed at the prevailing price, ranitidine capsules are substantially more lucrative than tablets for pharmacies.

24. Relator alleges that in order to take advantage of the Medicaid pricing differential between ranitidine tablets and capsules, OmniCare took steps to illegally change all tablet prescriptions for their customers to capsule prescriptions.

25. Relator alleges that OmniCare reconfigured their computer order entry system so that it became impossible to order ranitidine tablets. Upon receiving tablet prescriptions, OmniCare's data entry clerical personnel could not process the orders. Relator alleges that OmniCare therefore instructed their clerical personnel to physically alter the prescriptions to make it appear that physicians had prescribed capsules instead of tablets. After such a change was made, the data entry personnel could then enter the appropriate prescription information into the order entry system and the order for capsules was filled by OmniCare pharmacists, including Mr. Lisitza.

26. The altered order (from tablets to capsules) was also entered on the patients' Physician Order Sheets. When these sheets were verified monthly by nursing home physicians per state regulations, they would fail to notice the change in dosage form. (Relator believes few physicians were aware of the price differential.) Physicians would sign off on the Physician Order Sheets, appearing to approve the change in form from tablet to capsule.

27. A similar system existed for patients receiving refills on ranitidine. Patients who previously received

ranitidine tablets could no longer do so after OmniCare altered their computerized order system; instead they were given capsules and the change was made to their Physician Order Sheets.

C. OmniCare's Falsely Inflating Prescription Charges through Illegally Changing Dosage Forms

28. Ranitidine and tablets are not considered the same medication under federal and state law. A pharmacy cannot unilaterally switch between one form of ranitidine and another without a physician's express order. Because ranitidine is only administered to intubated patients, in the normal course of business ranitidine capsules would rarely, if ever, be prescribed. By instructing their clerical personnel to manually alter the prescriptions to prescribe capsules rather than tablets, OmniCare violated several federal and state regulations concerning appropriate pharmaceutical care.

29. Relator Lisitza was concerned about the inappropriate and illegal switch in dosage form. However, Relator alleges that when he raised the issue of potential illegality of OmniCare's practices, he was informed by management, specifically by Ms. Marge Ford, at the time the Operations Manager for OmniCare's Illinois facilities, that he would face termination if he continued to complain about the scheme.

30. By switching prescription dosage form from tablet to capsule, OmniCare billed and received substantially more money from IDPA than IDPA should have paid. The market rate for capsules, billed illegally by OmniCare, is some two to four times higher than the appropriate Federal Upper Limit price for

ranitidine tablet (the price at which OmniCare should have been reimbursed had tablets been prescribed). By switching dosage forms illegally, OmniCare overbilled the government by millions of dollars.

31. OmniCare has within its exclusive possession and control documents that would allow plaintiffs to plead this fraud with greater specificity. Documents that would reflect the fraud include: the original verbal orders as transcribed by OmniCare nurses compared with the orders entered into OmniCare's data entry system; changes in OmniCare's billing to IDPA for ranitidine demonstrating a sudden and abrupt change from tablets to capsules and a sharp increase in IDPA reimbursements; wholesale order records for ranitidine capsules and tablets; and "Physician Order Sheets" for clients whose medication was switched inappropriately from ranitidine tablets to raniditine capsules.

32. Lisitza, on information and belief, believes that OmniCare's practices in making false claims to the government are based on a policy promulgated from OmniCare's corporate headquarters throughout the country.

33. Relator Lisitza believes that OmniCare's practices in making false claims to the government are therefore not limited to Illinois facilities, but are likely taking place in other states with either a Medicaid whistleblower statute or a false claims act in their state laws.

D. OmniCare's Retaliation Against Lisitza

34. Approximately two years before his termination, Lisitza began investigating the possibility that Physician Authorization Letters (or "PALs") were being obtained using misleading information. PALs

are letters sent to physicians requesting that they sign off on a blanket authorization to switch from one drug to another. Lisitza believed that PALs were being solicited from physicians under false pretenses—namely that OmniCare told physicians the medication switch they were approving would save patients money, when the opposite was often the case.

35. Lisitza used his computer access code to investigate his concerns. He reported to senior officials at OmniCare when he discovered that, contrary to what physicians were being told, the cost of switched products (per the PALs procured by OmniCare) exceeded the cost of products originally prescribed.

36. These investigations, authorized at the time by OmniCare senior managers, triggered alerts in the office of the Manager of Data Entry for OmniCare at the time, Martin Gahan.

37. Mr. Gahan, believing that Lisitza was doing investigations without authorization, approached OmniCare's Director of Human Resources and, on information and belief, instigated and implemented a plan to terminate Lisitza for his activities.

38. Over the course of his investigations, Lisitza discovered the ranitidine scheme being employed by OmniCare. (OmniCare did not attempt to procure PALs for the switch between tablets and capsules.) Concerned that patients and the government were being overcharged, he brought his discoveries concerning OmniCare's ranitidine capsule-for-tablet switch-outs to OmniCare senior managers' attention.

39. The scheme to terminate Lisitza at that point escalated into a pattern of harassment and entrapment, wherein OmniCare employees reported Lisitza

for seemingly minor incidents, leading to a multitude of writeups and threatened termination.

40. When Lisitza continued to voice his concern that OmniCare was engaged in activities that violated Federal and state statutes, he was targeted for termination.

41. Despite years of consistently excellent performance reviews prior to voicing his concerns that OmniCare was violating the law with its ranitidine switchout scheme, Lisitza's subsequent performance reviews rated him poorly.

42. Through a series of minor incidents that were, on information and belief, orchestrated and engineered by OmniCare's senior management, Lisitza was repeatedly "written up" and given verbal and written warnings because of alleged violations of company policy concerning employee conduct. Lisitza signed several of these warnings indicating he had received them, without indicating that he was in fact guilty of the behavior alleged.

43. Lisitza was ostracized from normal interactions at OmniCare, which had been routine for years before. For example, in staff meetings, senior OmniCare managers began to repeatedly credit others for Lisitza's work. Lisitza was excluded from supervisory meetings in which he had previously been able to participate. One Vice President began to publicly refer to Lisitza as "trouble" upon seeing him. Senior managers who previously met with Lisitza one-on-one refused to speak to him.

44. As a result of the actions and other discriminatory and retaliatory acts, Lisitza was placed in an extremely hostile work environment and suffered emotional distress.

45. The incidents of "bad behavior" alleged by OmniCare escalated in frequency and seriousness until such time as Lisitza was terminated.

46. When Lisitza was termainated, he was informed by OmniCare that if he did not sign the paperwork presented to him he would not receive any severance pay. He therefore signed all papers presented to him at that time.

VI. DAMAGES TO THE GOVERNMENT

47. This fraud was instigated by high-level OmniCare corporate officers. Therefore, similar false claims are currently being made to all states' Medicaid programs where Medicaid reimbursement rates allow OmniCare to maximize their reimbursements.

48. The scheme described above also defrauds the Government through any reimbursements to OmniCare in Medicare, Champus or other programs.

EXHIBIT 4

– Main Justice – http://www.mainjustice.com –

Assistant Attorney General Tony West's Remarks on FY 2010 False Claims Act Recoveries

Posted By Main Justice staff On November 22, 2010 @ 12:55 pm

FOR IMMEDIATE RELEASE CIV

MONDAY, NOVEMBER 22, 2010

WWW.JUSTICE.GOV

REMARKS AS PREPARED FOR DELIVERY
BY ASSISTANT ATTORNEY GENERAL
FOR THE CIVIL DIVISION

TONY WEST AT THE PEN AND PAD BRIEFING
ON CIVIL FRAUD RECOVERIES

WASHINGTON, D.C.

Thank you all for coming. My name is Tony West, and I'm the Assistant Attorney General for the Civil Division of the Department of Justice. In that capacity, I oversee much of the Federal Government's civil litigation across the country—that includes national security cases like GTMO habeas and state secrets; consumer protection cases like mortgage fraud; and cases to recapture billions of taxpayers' dollars lost to fraud, waste and abuse.

* * *

In fact, since January 2009, when this Administration took office, the Civil Division, together with the U.S. Attorneys' offices, has recovered $5.4 billion in funds secured through fraud and false claims—the largest two-year recovery of taxpayer dollars in the history of the Justice Department.

* * *

But in addition to those mega-cases, there are other cases in the numbers that go to the heart of why it's so important to be aggressive in this fight against fraud. Cases like those involving the supplies of goods and services to our troops in Iraq and Afghanistan. In FY2010, we recovered over $10 million in taxpayer funds in connection with procurement fraud involving the wars in Southwest Asia.

* * *

Or cases that go to the heart of providing quality care to our most vulnerable citizens—the Small Smiles case, where our investigation found that dentists were performing unnecessary tooth extractions or excessive baby root canals on children who were Medicaid patients. Or the Omnicare matter, where we found that the company solicited and received kickbacks from pharmaceutical manufacturers to recommend the use of their drugs to elderly patients in nursing homes, including powerful antipsychotic drugs used to control their behavior.

* * *

These cases wouldn't have been possible without the hard work and dedication of the many Civil Division lawyers, U.S. Attorneys, investigators, auditors, and other public servants who investigate and prosecute these cases. We also have to thank the whistleblowers who often risk their careers to bring allegations of fraud to the Government's attention through the qui tam provisions of the False Claims Act. This past year, whistleblowers' qui tam suits accounted for more than $2.3 billion of the $3 billion recovered.

* * *

EXHIBIT 5

Justice News

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, November 3, 2009

Nation's Largest Nursing Home Pharmacy and Drug Manufacturer to Pay $112 Million to Settle False Claims Act Cases

U.S. Also Files Complaint Against Two Atlanta-Based Nursing Home Chains and Their Principals

WASHINGTON—The nation's largest nursing home pharmacy, Omnicare Inc. of Covington, Kentucky, will pay $98 million, and drug manufacturer, IVAX Pharmaceuticals of Weston, Florida, will pay $14 million to resolve allegations that Omnicare engaged in kickback schemes with several parties, including IVAX, the Justice Department announced today. Approximately $68.5 million of the settlement proceeds will go to the United States, while $43.5 million has been allocated to cover Medicaid program claims by participating states.

At the same time, the United States announced that it has intervened and filed a complaint against two large nursing home chains, Mariner Health Care Inc. and SavaSeniorCare Administrative Services LLC, both of Atlanta, and their principals, Leonard Grunstein, Murray Forman, and Rubin Schron, for accepting a kickback from Omnicare in return for pharmacy services contracts.

The settlement with Omnicare—the nation's largest pharmacy that specializes in providing drugs to

nursing home patients—resolves allegations that the company solicited or paid a variety of kickbacks. The company allegedly solicited and received kickbacks from a pharmaceutical manufacturer, Johnson & Johnson (J&J), in exchange for agreeing to recommend that physicians prescribe Risperdal, a J&J antipsychotic drug, to nursing home patients. J&J's kickbacks to Omnicare took multiple forms, including rebates that were conditioned on Omnicare engaging in an "Active Intervention Program" for Risperdal and payments disguised as data purchase fees, educational grants, and fees to attend Omnicare meetings. The government further alleged that Omnicare regularly paid kickbacks to nursing homes by providing consultant pharmacist services at rates below the company's cost and below the fair market value of such services in order to induce the homes to refer their patients to Omnicare for pharmacy services. The government also alleged that Omnicare solicited, and IVAX paid, $8 million in kickbacks in exchange for Omnicare's agreement to purchase $50 million in drugs from IVAX. These allegations against Omnicare and IVAX, now a subsidiary of Teva Pharmaceuticals Industries, Ltd., are detailed in a complaint unsealed today and originally filed under the *qui tamor* whistleblower provisions of the False Claims Act in the District of Massachusetts.

"These defendants broke the law to take advantage of our nation's most vulnerable citizens—the elderly and the poor," said Tony West, Assistant Attorney General for the Civil Division of the Department of Justice. "Illegal conduct like this can undermine the medical judgments of health care professionals, lead to patients being prescribed medications they do not need, and drive up the costs of health care." Assistant Attorney General West thanked the collaborative

efforts of the Department of Justice's Civil Division, the U.S. Attorney for the District of Massachusetts, the Office of Inspector General of the Department of Health and Human Services, the Food and Drug Administration Office of Criminal Investigations, and the Federal Bureau of Investigation.

"Omnicare and other nursing home pharmacies specialize in providing drugs to elderly patients who are often suffering from Alzheimer's Disease or dementia and who have little or no control over the drugs they receive," said Michael Loucks, Acting U.S. Attorney for the District of Massachusetts. "Today's settlement provides a strong message to these pharmacies, as well as to pharmaceutical companies and nursing homes, that the government will not tolerate the payment of kickbacks which can distort proper medical judgment and put profits ahead of good medical care."

As part of the settlement, Omnicare and IVAX have agreed to enter into separate corporate integrity agreements with the Office of Inspector General of the Department of Health and Human Services. Those agreements provide for procedures and reviews to be put in place to avoid and promptly detect conduct similar to that which gave rise to these matters.

In a separate action, the United States alleges that Omnicare, Mariner Health Care, SavaSenior Care, Grunstein, Forman, and Schron conspired to arrange for Omnicare to pay the nursing home chains $50 million in exchange for the right to continue providing pharmacy services to the nursing homes, which together constituted one of Omnicare's largest customers. According to the government's complaint, these defendants attempted to disguise the $50 million kickback as a payment to acquire a small Mariner

Health Care business unit that had only two employees and was worth far less than $50 million. After they became aware of the government's investigation, Grunstein, Forman, and Schron allegedly created backdated documents in a further attempt to hide the kickback. These allegations are detailed in a separate complaint that was unsealed today. Today's settlement resolves the allegations against Omnicare and IVAX; the United States will proceed with its case against the Mariner Health Care defendants, which was originally filed as a whistleblower action.

09-1186 Civil Division

EXHIBIT 6

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed January 15, 2010]

Civil Action No. 07-10288-RGS
Civil Action No. 05-11518-RGS

UNITED STATES OF AMERICA, *ex rel.*
BERNARD LISITZA and DAVID KAMMERER,
Plaintiffs,

v.

JOHNSON & JOHNSON, ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., and JOHNSON & JOHNSON HEALTH CARE SYSTEMS, INC.,
Defendants.

COMPLAINT OF THE UNITED STATES

This is an action against defendant pharmaceutical manufacturer Johnson & Johnson and two of its subsidiaries (collectively, "J&J") to recover treble damages, restitution, and civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-33, and the common law for causing Omnicare, Inc. ("Omnicare"), the nation's largest long-term care pharmacy, to submit false claims to Medicaid as a result of numerous kickbacks that J&J paid to Omnicare in violation of the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b), during the period from 1999 through 2004. At the time, Omnicare was one of J&J's largest

customers, especially for Risperdal, a J&J anti-psychotic drug that, at J&J's behest, Omnicare pharmacists recommended for nursing home patients who exhibited behavioral symptoms associated with Alzheimer's Disease and dementia. Over the years 1999 through 2004, J&J paid Omnicare tens of millions of dollars in kickbacks to induce Omnicare to purchase and to recommend Risperdal and other J&J drugs. As detailed below, these kickbacks took various forms, including market share rebate payments conditioned on Omnicare engaging in "active intervention programs" for J&J drugs, payments that were ostensibly for the purchase of Omnicare data, and various "grants" and other payments, all of which J&J intended to induce Omnicare to purchase and to recommend J&J drugs.

The kickbacks achieved J&J's intended purpose. During the 1999 through 2004 period, Omnicare engaged in intensive efforts to convince physicians to prescribe J&J drugs, and Omnicare's annual purchases of J&J drugs increased from approximately $100 million to over $280 million, with annual purchases of Risperdal alone rising to over $100 million. For a substantial portion of these purchases, Omnicare then submitted reimbursement claims to Medicaid.

Jurisdiction and Venue

1. This Court has subject matter jurisdiction under 28 U.S.C. § 1345. The Court has supplemental jurisdiction to entertain the common law cause of action under 28 U.S.C. § 1367(a). The Court may exercise personal jurisdiction over J&J, and venue is appropriate in this Court, under 31 U.S.C. § 3732(a), because J&J transacts business in this District and

caused to be submitted or conspired to submit false claims in this District.

The Parties

2. Plaintiff United States, acting through the Department of Health and Human Services ("HHS"), administers Grants to States for Medical Assistance Programs pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* ("Medicaid").

3. Relator Bernard Lisitza is a resident of Illinois.

4. Relator David Kammerer is a resident of Ohio.

5. Defendant Johnson & Johnson is a manufacturer and seller of pharmaceutical products and medical devices.

6. Ortho-McNeil-Janssen Pharmaceuticals, Inc., a subsidiary of Johnson & Johnson, is a manufacturer and seller of pharmaceutical products. It is the successor in interest to Janssen Pharmaceutica Products, L.P. ("Janssen"), and Ortho-McNeil Pharmaceutical Products, Inc. ("OMP"). During the period from 1999 through 2004, Janssen sold pharmaceutical products, including Risperdal, an atypical (also known as a second generation) antipsychotic drug, and OMP sold pharmaceutical products, including Levaquin, an antibiotic drug. During this period, both Janssen and OMP sold their pharmaceutical products to Omnicare.

7. Johnson & Johnson Health Care Systems, Inc., is the contracting arm of Johnson & Johnson and entered into contracts with Omnicare on behalf of Johnson & Johnson, Janssen, and OMP.

8. Omnicare was originally named as a defendant in Civil Action No. 05-11518-RGS, but was dismissed from that action by order dated November 12, 2009, pursuant to a settlement agreement. Omnicare is the

nation's largest provider of pharmacy dispensing services to nursing homes and other long-term care facilities. Through contracts with nursing homes, it dispenses drugs to approximately 1.4 million long-term care residents in 47 states, including Massachusetts. Omnicare also provides consultant pharmacist services to nursing homes. As J&J was well aware, Omnicare's pharmacists and consultant pharmacists have significant influence over the drugs that nursing home residents receive.

Legal Background

9. The False Claims Act provides, in pertinent part, that any person who:

> (a)(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (a)(1)(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; . . . or
>
> (a)(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;...
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, . . . plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3729.[1] For purposes of the False Claims Act,

> the terms "knowing" and "knowingly" mean that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b) (1986).

10. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461 (notes), and 64 Fed. Reg. 47099, 47103 (1999), the False Claims Act civil penalties were adjusted to $5,500 to $11,000 for violations occurring on or after September 29, 1999.

11. The federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b), arose out of congressional concern that remuneration given to those who can influence healthcare decisions would result in goods and services being provided that are medically unnecessary, of poor quality, or even harmful to a vulnerable patient population. To protect the integrity of the Medicare and Medicaid programs from these harms, Congress enacted a prohibition against the payment

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[1] On May 20, 2009, the False Claims Act was amended pursuant to Public Law 111-21, the Fraud Enforcement and Recovery Act of 2009 ("FERA"). Section 3729(a)(1)(B) was formerly Section 3729(a)(2), and is applicable to this case by virtue of Section 4(f) of FERA, while Sections 3279(a)(1) and 3279(a)(3) of the statute prior to FERA, and as amended in 1986, remain applicable here.

of kickbacks in any form. First enacted in 1972, Congress strengthened the statute in 1977 and 1987 to ensure that kickbacks masquerading as legitimate transactions did not evade its reach. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 242(b) and (c); 42 U.S.C. § 1320a-7b, Medicare-Medicaid Antifraud and Abuse Amendments, Pub. L. No. 95-142; Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93.

12. The anti-kickback statute prohibits any person or entity from knowingly and willfully offering, making, soliciting, or accepting remuneration, in cash or in kind, directly or indirectly, to induce or reward any person for purchasing, ordering, or recommending or arranging for the purchasing or ordering of federally-reimbursable medical goods or services:

> [W]hoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—
>
> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b)(2). Violation of the statute also can subject the perpetrator to exclusion from participation in federal health care programs and, effective August 6, 1997, civil monetary penalties of $50,000 per violation and three times the amount of remuneration paid. 42 U.S.C. § 1320a-7(b)(7) and 42 U.S.C. § 1320a-7a(a)(7).

Omnicare's Relationship With Medicaid

13. Omnicare delivers drugs to patients in nursing homes, and submits reimbursement claims on behalf of those patients to their insurers, including Medicaid. J&J understood that Omnicare submitted approximately 65 percent of its reimbursement claims to Medicaid.

14. Medicaid is a joint federal-state program that provides health care benefits for certain groups, primarily the poor and disabled. The federal portion of each state's Medicaid payments, known as the Federal Medical Assistance Percentage ("FMAP"), is based on the state's per capita income compared to the national average. 42 U.S.C. § 1396d(b). Among the states, the FMAP is at least 50 percent and is as high as 83 percent.

15. The Medicaid programs of all states reimburse for prescription drugs. The vast majority of states award contracts to private companies to evaluate and process claims for payment on behalf of Medicaid recipients. Typically, after processing the claims, these private companies then generate funding requests to the state Medicaid programs. Before the beginning of each calendar quarter, each state submits to the Centers for Medicare & Medicaid Services ("CMS") an estimate of its Medicaid federal funding needs for the quarter. CMS reviews and adjusts the

quarterly estimate as necessary, and determines the amount of federal funding each state will be permitted to draw down as it actually incurs expenditures during the quarter. The state then draws down federal funding as actual provider claims, including claims from pharmacies seeking payment for drugs, are presented for payment. After the end of each quarter, the state then submits to CMS a final expenditure report, which provides the basis for adjustment to the quarterly federal funding amount (to reconcile the estimated expenditures to actual expenditures). 42 C.F.R. § 430.30.

16. Omnicare is a party to provider agreements with each of the state Medicaid programs to which it submits drug reimbursement claims. In Massachusetts, for example, Omnicare has a provider agreement with MassHealth. Massachusetts regulations provide that: "All pharmacies participating in MassHealth must comply with the regulations governing MassHealth, including but not limited to MassHealth regulations set forth in 130 CMR 406.000 and 450.000." The Massachusetts regulation at 130 CMR 450.261 in turn provides: "All members and providers must comply with all federal and state laws and regulations prohibiting fraudulent acts and false reporting, specifically including but not limited to 42 U.S.C. 1320a-7b [the federal anti-kickback statute]."

Background on Omnicare's Consultant Pharmacists and Omnicare's Relationship with J&J

17. In 1983, at the urging of Congress, the Health Care Financing Administration, now known as CMS, contracted with the Institute of Medicine, a group chartered by the National Academy of Sciences, to conduct a study of quality of care in nursing homes.

See Institute of Medicine, *Improving the Quality of Care in Nursing Homes* at 2 (1986). The Institute of Medicine performed the study and included among its findings that "understaffed [nursing] facilities may make excessive use of antipsychotic drugs to substitute for inadequate numbers of nursing staff." *Id.* at 54.

18. In the Omnibus Budget Reconciliation Act of 1987 ("OBRA '87"), Pub. L. 100-203, Congress amended the Social Security Act (the "Act") to mandate that nursing homes "protect and promote the rights of each resident, including . . . the right to be free from . . . chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. § 1396r(c)(1)(A)(ii). Congress further amended the Act to provide as follows:

> Psychopharmacologic drugs may be administered only on the orders of a physician and only as part of a plan (included in the written plan of care described in paragraph (2)) designed to eliminate or modify the symptoms for which the drugs are prescribed and only if, at least annually an independent, external consultant reviews the appropriateness of the drug plan of each resident receiving such drugs.

42 U.S.C. § 1396r(c)(1)(D).

19. In order to implement the OBRA '87 amendments to the Act, HHS promulgated a regulation, now codified at 42 C.F.R. § 483.60(c), which provides that, in each nursing home:

> (1) The drug regimen of each resident must be reviewed at least once a month by a licensed pharmacist.

(2) The pharmacist must report any irregularities to the attending physician and the director of nursing, and these reports must be acted upon.

See 54 Fed. Reg. 5316, 5345 (1989) ("This provision is in accordance with the spirit of [42 U.S.C. § 1396r(c)(1)(D)], added by OBRA '87, which strongly emphasizes efforts to control the abuse of psychopharmacologic drugs as chemical restraints."). Thus, each nursing home must arrange for a consultant pharmacist to review the medications of each of its residents at least once a month. During the course of these reviews, the consultant pharmacists make recommendations—which are ostensibly objective—to remove, change, or add medications to the nursing home residents' drug regimens.

20. During the period from 1999 and continuing at least through 2004, Omnicare employed hundreds of consultant pharmacists and relied on them to make recommendations to nursing home physicians about the drugs they should prescribe for nursing home residents. In some cases, as with J&J, Omnicare struck deals with a drug manufacturer for Omnicare's consultant pharmacists to recommend that manufacturer's products.

21. As J&J observed in an internal memorandum from 2003:

> Omnicare has over 900 consultant pharmacists who review patient charts monthly and make recommendations based on the formulary and Omnicare programs for physicians. Pharmacists' recommendations are accepted more than 80% of the time. Consultant pharmacists actively meet with physicians or correspond with them through

> the mail to obtain approval to make appropriate medication switches for all their applicable nursing home patients. . . . Omnicare consultant pharmacists receive monthly "report cards" showing them their success in obtaining goals for therapeutic programs."

(A copy of the 2003 J&J memorandum that includes this statement is attached hereto as Exhibit 1.)[2] In the same memorandum, J&J observed that Omnicare's "consultant pharmacists are active in having physicians sign therapeutic interchange forms that allow pharmacists to review charts and make switches without having to consult with the physician." *See id.* at JNJ 351940. J&J further understood that consultant pharmacists had a "[h]igh degree of impact on product selection" in nursing homes and that their recommendations were "highly motivated based on economics," which depended "less on net costs [to payers], and more on quality of product and 'spread' (their margin)." (A copy of the 2003 J&J presentation that includes these statements is attached hereto as Exhibit 2.) A J&J National Account Manager similarly observed that, while Omnicare could effect dramatic shifts in utilization from one drug to another, "in order to have the Omnicare's of the world drive share that high, it must be financially wor[th] their while." (A copy of the J&J e-mail containing this statement is attached as Exhibit 3.)

22. J&J and Omnicare both used the term "intervention" to refer to the process in which Omnicare pharmacists and consultant pharmacists obtained physician authorization to switch nursing

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[2] Where noted, personal information has been redacted from the exhibits to this Complaint.

home patients from one drug to another. J&J viewed consultant pharmacists engaged in such intervention programs as an "Extension of [the J&J] Sales Force." (A copy of the J&J presentation that includes this statement is attached hereto as Exhibit 4.) During much of the 1999 through 2004 time period, Omnicare's primary intervention was to drive prescriptions of Risperdal, an atypical antipsychotic drug that can be used as a chemical restraint. As Tim Bien, Omnicare's Senior Vice President of Professional Services and Purchasing, wrote in a 2001 letter to J&J: "WE ARE SELLING MORE HIGH PRICED DRUGS (read Risperdal here) FOR THE PHARMACEUTICAL INDUSTRY!!" (A copy of Mr. Bien's 2001 letter to J&J is attached hereto as Exhibit 5.) Overall, Omnicare and J&J shared the goal of increasing spending by Medicaid and other federal health care programs on J&J drugs. Thus, when Omnicare and J&J were to meet on or about January 18, 2001, Omnicare wrote that one of its goals for the meeting was to obtain help from J&J in conveying to Congress that the United States "NEED[S] TO SPEND MORE ON MEDS." (A copy of the document containing this statement is contained in Exhibit 6.)

J&J's Understanding of the Anti-Kickback Statute

23. J&J and its employees understood that it was a violation of the anti-kickback statute to offer or to pay remuneration, by whatever means, to induce a customer like Omnicare to purchase or to recommend J&J drugs. For example, J&J understood from its outside counsel that the company could violate the law through market share rebate agreements, *i.e.*, agreements where J&J agreed to pay customers rebates for switching patients from competitors' drugs to J&J drugs. (A copy of an internal J&J e-mail chain

reflecting this understanding is attached hereto as Exhibit 7.) Likewise, the J&J employees responsible for handling the Omnicare account understood from the company's in-house attorneys that J&J could violate the law by using payments to customers for data as a substitute for discounts or rebates that, if disclosed, could increase J&J' s financial obligations to the Medicaid program. (A copy of an internal J&J e-mail chain reflecting this understanding is attached hereto as Exhibit 8.) J&J employees also understood that it would be a kickback to pay a customer like Omnicare for the sake of fostering a relationship or for good will, where J&J's goal was always to convince Omnicare to purchase and to recommend J&J drugs.

24. As this complaint alleges, notwithstanding J&J's understanding of the anti-kickback statute, J&J repeatedly violated the statute in its relationship with Omnicare by paying Omnicare rebates to switch patients to J&J drugs, making payments to Omnicare for data (that J&J was not actually receiving) as a substitute for rebates or discounts, and paying Omnicare various grants and sponsorship fees whose purpose was to induce Omnicare to purchase and to recommend J&J drugs. Notably, J&J recognized the problematical nature of its relationship with Omnicare. As one J&J employee described a September 2002 internal meeting, J&J's Omnicare sales team "got hammered re Healthcare Compliance." (A copy of the e-mail containing this statement is attached hereto as Exhibit 9.)

J&J's Kickbacks to Omnicare

Rebate Payments Contingent on Active Intervention by Omnicare

25. The drug supply agreement in place between J&J and Omnicare in 1999 was signed on April 8,

1997, and had an ostensible term of April 1, 1997, to March 31, 2000 (hereinafter, the "1997 Agreement"). (A copy of the 1997 Agreement is attached hereto as Exhibit 10.) The 1997 Agreement provided for J&J to sell Omnicare certain drugs, including Risperdal, Propulsid, Levaquin, Procrit, Duragesic, and Ultram, and for J&J then to pay Omnicare quarterly market share rebates, where the percentage amount of the rebate on each drug increased as market share of that drug increased, and market share was determined based on Omnicare's purchases of each drug in comparison to Omnicare's purchases of competing products. The 1997 Agreement further required J&J to pay Omnicare an "Annual Strategic Product Performance Rebate" on specific drugs that had "an Active Intervention Program (AIP) or Appropriate Use Program (AUP) applied in their favor." *Id.* at JNJ 001100. The 1997 Agreement defined AIP and AUP as follows:

> "Active Intervention Program" shall mean a program, applied by [Omnicare] and accepted by [J&J] in writing, which is designed to appropriately shift market share to [J&J]'s Product. Active interventions can include, but are not limited to, disease management initiatives, written correspondence to Participating Providers prescribing or dispensing pharmaceutical products, educating nursing home staff regarding [J&J]'s Products, [and] conducting clinical intervention programs through which consultant pharmacists recommend Supplier's Products when appropriate.
>
> "Appropriate Utilization Program" or "AUP" shall mean a program applied by [Omnicare], and

> accepted in writing by Supplier, designed to cause the appropriate use of [J&J]'s Products.

Id. at JNJ 001089.

26. In November 1998, J&J and Omnicare signed an amendment to the 1997 Agreement concerning Levaquin. (A copy of this amendment is attached hereto as Exhibit 11.) The amendment specified that:

> All Rebates are contingent upon the existence of and adherence to the following interventions:
>
> – Levaquin® will have a Selected formulary position and will be first line therapy for quinolones, when clinically appropriate and indicated. For the purpose of this Amendment, "Selected" shall mean . . . Levaquin® is favored, when clinically appropriate and indicated, over all other branded Drugs also available.
>
> * * *
>
> – [Omnicare's] appropriate personnel will actively participate in educational and promotional programs discussing Levaquin®'s clinical advantages.

Id. at 1079.

27. In J&J's words, J&J intended all of its rebates to Omnicare to be "incentives to Omnicare to advocate appropriate use of J&J products." (A copy of the J&J document containing this statement is attached hereto as Exhibit 12.) J&J calculated its return from the rebates it provided to Omnicare. In 2003, J&J determined that, "for a $3MM investment in rebates with Omnicare, [J&J] gains $9MM in sales, less costs and investments, returns $4.8MM to OMP." (A copy of the

e-mail containing this statement is attached hereto as Exhibit 13.) Another J&J manager calculated that J&J could generate the same return with just $1.44 million in rebates. *See id.* J&J also understood that "Rebates represent approximately 60% + of [Omnicare's] net income model." (A copy of the e-mail containing this statement is attached hereto as Exhibit 14.)

28. In March 2000, J&J and Omnicare signed a new drug supply agreement with an ostensible term from April 1, 1999, to March 31, 2004 (hereinafter, the "2000 Agreement"). (A copy of the 2000 Agreement is attached hereto as Exhibit 15.) In similar fashion to the 1997 Agreement, the 2000 Agreement provided for J&J to sell certain drugs to Omnicare, and for J&J to pay Omnicare market share rebates and an additional two percent "Annual Product Performance Incentive." The 2000 Agreement further specified that J&J would not pay any rebates to Omnicare for a particular drug unless Omnicare had "an AIP/AUP, as and when specified under the Schedule of Qualifying Active Intervention Programs," for that drug. *See id.* at JNJ 001033. The 2000 Agreement's definitions of "Active Intervention Program" and "Appropriate Utilization Program" were identical to those in the 1997 Agreement. The 2000 Agreement included a "Schedule of Qualifying Intervention Programs" for specific drugs. *See id.* at JNJ 001043. This Schedule included the following provisions:

> <u>Duragesic and Ultram approved AUP</u>
>
> National Pain Management Initiative was jointly developed by [Omnicare] and [J&J] to enhance compliance to this Agreement and completed by

June 30, 1999. The training initiative was designed to and accomplished the following:

* * *

- Train consultant pharmacists to identify residents receiving inappropriate or inadequate pain management therapy and where Duragesic and Ultram may be appropriate alternative medications.
- Equip consultant pharmacists to effectively communicate recommendations regarding pain management to prescribing physicians and other health care professionals.

Levaquin

Levaquin® will have a Selected formulary position and will be first line therapy for quinolones, when clinically appropriate and indicated. . . . "Selected" shall mean . . . Levaquin® is favored, when clinically appropriate and indicated, over all other branded Drugs also available.

* * *

- [Omnicare's] appropriate personnel will actively participate in educational and promotional programs discussing Levaquin®'s clinical advantages.
- [Omnicare] will facilitate access of [J&J] representatives to its Participating Sites.

Risperdal

Risperdal® will have a Selected formulary position and will be the first line anti-psychotic, when clinically appropriate and indicated. . . . "Selected" shall mean. . . Risperdal® is favored,

> when clinically appropriate and indicated, over all other branded Drugs also available. All other competitive atypical anti-psychotic products in the Defined Market are Prior Authorized for Risperdal® failure.
>
> During the first two quarters following the effective date of this Agreement, [Omnicare] shall work with [J&J] to implement communication effort to inform attending physicians of Risperdal®'s formulary position and to enhance compliance of this Agreement.
>
> [Omnicare]'s appropriate personnel will actively participate in educational and promotional programs discussing Risperdal®'s clinical adventages. [J&J] will organize such programs. [Omnicare] will facilitate access of [J&J] representatives to its Participating Sites.

Id. at JNJ 001043.

29. During the period from 1999 through 2004, J&J paid Omnicare tens of millions of dollars in market share rebates pursuant to the 1997 Agreement and the 2000 Agreement. In many instances, at Omnicare's request, J&J paid quarterly rebates to Omnicare in advance, thus effectively providing Omnicare with interest-free loans of millions of dollars.

Payments for Data as Substitute for Rebate Payments that J&J Would Have Had to Disclose to Medicaid

30. Congress enacted the Medicaid Drug Rebate Statute, 42 U.S.C. § 1396r-8, to ensure that the Medicaid program would receive the benefit of the same discounts and prices on drugs that other large public and private purchasers enjoyed. *See* H.R.

Rep. No. 101-881, at 96 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2108. Under the Medicaid Drug Rebate Statute, in order for a brand name drug, such as Risperdal, to be covered and reimbursed by the Medicaid program, its manufacturer has two primary obligations. First, the manufacturer must report on a quarterly basis to the Secretary of HHS the drug's "average manufacturer price" and the "best price" offered for that drug. 42 U.S.C. § 1396r-8(b)(3)(A). Second, the manufacturer must pay each state a quarterly rebate equal to the total number of drug units (*e.g.*, pills) purchased by the state times the greater of (1) 15.1 percent of the drug's average manufacturer price, or (2) the difference between the average manufacturer price and the best price. 42 U.S.C. § 1396r-8(c)(1)(A). In other words, for a drug like Risperdal, J&J was required to pay at least a 15.1 percent rebate to each state on all of its Risperdal sales for Medicaid patients, but J&J would have to pay a higher Medicaid rebate on all of those sales if it offered any single customer, *e.g.*, Omnicare, a total discount that exceeded 15.1 percent.

31. During the late 1990s and early 2000s, J&J rarely, if ever, reported a quarterly "best price" for Risperdal that reflected total discounts in excess of the minimum 15.1 percent rebate J&J was required to pay to the state Medicaid programs. In 1999, however, J&J became concerned that, combined with the up-front discounts on Risperdal that J&J was giving to Omnicare, the additional quarterly rebates J&J owed to Omnicare would set a new "Best Price" that J&J would have to report to the Medicaid program. In an August 1999 e-mail, a J&J employee commented that: "[t]otal rebates [on J&J's Risperdal sales to Omnicare] in both 1Q99& 4Q98 needed to be reduced because the combined front end price and performance rebate

exceeded 15%." (A copy of the J&J e-mail that includes this statement is attached hereto as Exhibit 16.) As of September 1999, Omnicare was taking the position that J&J owed it approximately $700,000 in 1998-1999 rebates that J&J did not want to pay because of best price concerns. (A copy of the J&J e-mail reflecting Omnicare's position is attached hereto as Exhibit 17.) J&J also believed that Omnicare had failed to meet the contract requirements for earning the rebates. Commenting on Omnicare's insistence on receiving the money and its lack of support for the amount sought, a J&J employee wrote to a colleague, "they just know that they need money." (A copy of the J&J document containing this statement is attached hereto as Exhibit 18.)

32. In or about October 1999, J&J began discussing with Omnicare the concept of J&J paying Omnicare for data identifying physician prescribers of anti-psychotics in lieu of paying Omnicare the hundreds of thousands of dollars in rebates Omnicare believed it was owed. (A copy of a J&J e-mail concerning the initiation of this discussion is attached hereto as Exhibit 19.) In seeking to justify this data purchase concept internally, J&J's Omnicare sales team noted that "Johnson & Johnson believes [Omnicare] to be the gold standard of Pharmacy Providers" and that Omnicare had "been able to switch propoxyphene prescriptions to Ultram and ha[d] done an outstanding job in generating Risperdal market share." (A copy of the J&J document containing these statements is attached hereto as Exhibit 20.)

33. During 1999, Omnicare already was providing—free of charge—the type of physician data J&J was proposing to buy from Omnicare. In an e-mail dated October 26, 1999, a J&J employee noted to his

colleagues that "[m]any of you have been collecting names of physicians from OMNICARE pharmacies." (A copy of this e-mail is attached hereto as Exhibit 21.) Similarly, in a document dated July 19, 1999, J&J noted that:

> In June of 1999, Omnicare was willing to provide a prescriber list to the J & J Group and the Janssen ElderCare Sales Force. These names were provided to the sales force in an effort to increase the call frequency on these resistant prescribers and to eventually influence them to use more Risperdal in the Elderly demented patient. As of July, 1999, over 350 names have been acquired and the representatives have begun their targeting on these prescribers.

Ex. 12 at JNJ 301390. In a "2000 Business Plan" concerning the Omnicare account, a J&J employee noted that his unit's "1999 Accomplishments" included having "Worked closely with Eldercare Sales Force in Developing Physician Call Activity Based on Omnicare Generated Lists." (A copy of the J&J document containing this statement is attached hereto as Exhibit 22.)

34. J&J was concerned about the legality of paying for data in lieu of paying a rebate. In connection with a dispute over rebates Omnicare claimed it was owed for an earlier period (from the second quarter of 1997 to the first quarter of 1998), J&J had concluded in June 1999 that paying for data in lieu of the rebate claimed by Omnicare would "put us at risk for fraud and abuse." (A copy of the J&J e-mail chain containing this statement is attached hereto as Exhibit 23.) Moreover, J&J was concerned that "[p]aying for data/analysis that Omnicare does currently for us such as the Risperdal (daily average consumption)

analysis will set a precedence [*sic*] for J&J paying Omnicare for data." *Id.* As a J&J Director of National Accounts later noted, "J&J Pharma, has previously gone on record, from corporate, that . . . [w]e will *not* pay customers for data." (A copy of the e-mail containing this statement is attached hereto as Exhibit 24.) But J&J made an exception to that policy for Omnicare.

35. In order to resolve the dispute with Omnicare over rebates allegedly owed for the fourth quarter of 1998 and the first quarter of 1999, J&J continued to pursue the concept of purchasing data from Omnicare pursuant to a "Consulting and Services Agreement." J&J viewed such an agreement as a means of "assisting [Omnicare] financially" with "some of the non market share activities that they do on our behalf," including "[c]ommunicating J&J promotions to nursing home[s] that they serve." (A copy of the e-mail chain containing these statements is attached hereto as Exhibit 25.)

36. As the process evolved, J&J began to consider having the total amount of data fee payments increased in order to serve as a substitute not only for the rebates from the fourth quarter of 1998 and the first quarter of 1999, but also for additional rebates in the form of the ongoing two percent Annual Product Performance Incentive (also referred to as a "strategic overlay") on Risperdal that J&J was required to pay under the 2000 Agreement. Thus, in a July 2000 e-mail, a senior manager in J&J's Long Term Care Group asked: "How close are we to finalizing a proposal around Omnicare consultant services revenues to replace the current 2% overlay?" (A copy of this e-mail is attached hereto as Exhibit 26.)

37. As with the rebates Omnicare was claiming for the fourth quarter of 1998 and the first quarter of 1999, J&J did not want to pay the strategic overlay in the 2000 Agreement because J&J feared the additional two percent discount on Risperdal would set a lower best price on Risperdal, and thus would substantially increase J&J's overall Medicaid rebate liabilities to the states. J&J explained its rationale in a document prepared in or about the summer of 2000:

> Recent developments
>
> 1. Consulting and Services Agreement
>
> a. Risperdal rebates have been pushing towards Best Price
>
> b. To avoid Best Price, the Strategic Overlay for Risperdal (2% of sales) had to be eliminated
>
> c. In order to balance this, an agreement was established with Omnicare to purchase data, roughly at the cost of the Strategic Overlay for Risperdal
>
> d. Data to be sent to J&J include data which is not available via IMS or other 3rd parties
>
> (Quarterly physician prescribing reports, quarterly competitive market share by pharmacy site, monthly market share reports.)

(A copy of the J&J document containing this passage is attached hereto as Exhibit 27.)

38. J&J and Omnicare signed their Consulting and Services Agreement in October 2000. (A copy of the Consulting and Services Agreement is attached hereto as Exhibit 28.) The agreement had a term of July 1, 2000, to April 1, 2004, and called for J&J to pay Omnicare $450,000 for the first three-month period of

the term, and then $300,000 per quarter thereafter, for a total of $4,650,000. In exchange, Omnicare was to provide the following:

A. **Physician Prescribing Report by Strategic Brand-[Quarterly]** This national report will list 200 competitive prescribing physicians for each J&J Strategic Brand (RISPERDAL® risperidone, DURAGESIC® fentanyl transdermal system, and ACIPHEX™ rabeprazole, LEVAQUIN TABS® levoflaxacin, LEVAQUIN IV® levoflaxacin, and ULTRAM® tramadol) and the preferred product of such physicians. This report will be provided by Omnicare's national clinical director.

B. **Competitive Market Share Report by Pharmacy Site-[Quarterly]** This report will list Days of Therapy (DOT) market shares at each Omnicare pharmacy site for the following J&J products and their relative competitive products as defined by their respective J&JHCS Defined Markets: Risperdal, Duragesic, Aciphex, Ultram, Levaquin, and Levaquin IV.

C. **Market Share Report by Pharmacy Site-[Monthly]** This report will list DOT market shares at each Omnicare pharmacy site for the following J&J products as defined by their respective J&JHCF Defined Markets: Risperdal, Duragesic, Aciphex, Ultram and Levaquin.

Id. at JNJ 001017.

39. At exactly the same time J&J and Omnicare signed the Consulting and Services Agreement, they also signed an amendment to the 2000 Agreement

removing Risperdal from the two percent strategic overlay. (A copy of this amendment is attached hereto as Exhibit 29.)

40. To justify the legality of the Consulting and Services Agreement internally, J&J purported to conduct a "fair market value" analysis of the data it agreed to purchase. In reality, however, Omnicare never supplied much of the data J&J had agreed to purchase, and J&J never demanded it. Neither Omnicare's national clinical director nor any other Omnicare employee ever supplied J&J with any quarterly lists of "200 competitive prescribing physicians for each J&J Strategic Brand . . . and the preferred product of such physicians," as part A of the Consulting and Services Agreement required. Instead, as had been the case prior to the signing of the Consulting and Services Agreement, local Omnicare pharmacy sites occasionally supplied local J&J sales representatives with names of prescribing physicians. As a J&J National Account Director later observed, the Omnicare pharmacies did so "randomly" and "generally not . . . willingly." (Copies of e-mail chains containing these statements are attached as Exhibits 30 and 31.).

41. Even though Omnicare did not provide the data it was contractually obligated to provide in the Consulting and Services Agreement, J&J paid Omnicare as specified under the agreement. (A copy of J&J's payment schedule pursuant to the Consulting and Services Agreement is attached hereto as Exhibit 32.) In cover letters enclosing J&J's payments to Omnicare pursuant to the Consulting and Services Agreement, J&J referred to each payment as a "marketing fee." (Copies of examples of these letters are attached hereto as Exhibit 33.) The letters also

cautioned Omnicare that "some or all of this amount may be considered a Discount which Omnicare may have an obligation to reflect in any cost report or claim for reimbursement with Medicare/Medicaid," even though J&J itself did not treat the payments as discounts and did not disclose them to Medicaid. *See id.*

J&J's "Grants" and Other Miscellaneous Kickback Payments to Omnicare

42. J&J supplemented its rebate and data fee kickbacks to Omnicare by paying various other kickbacks in the form of "grants," "educational funding," and meeting sponsorship fees. In January 1999, J&J noted that it had paid Omnicare "in excess of $1,000,000 since 1997 for educational, pull-through, and social activities." (A copy of the J&J document containing this statement is attached hereto as Exhibit 34.) J&J continued to make such payments in subsequent years.

43. $300,000 "Program Fee" in lieu of Rebates Claimed for 2Q97 to 1Q98. The Consulting and Services Agreement in 2000 was not the first time J&J devised a subterfuge to avoid paying Omnicare discounts or rebates that could have affected the Medicaid best price of Risperdal. In mid-1999, J&J considered whether it could pay Omnicare approximately $300,000 to satisfy Omnicare's claim under the 1997 Agreement's one percent strategic overlay provision for the period from the second quarter of 1997 to the first quarter of 1998. *See* Exhibit 23. J&J ultimately determined that it would be illegal to make such a payment. *See id.*

44. Instead of J&J paying $300,000 to Omnicare as a strategic overlay (which would have been reportable

to Medicaid for best price purposes), J&J and Omnicare orally agreed that J&J would pay Omnicare $300,000 for "educational funding." (A copy of the e-mail describing this oral agreement is attached hereto as Exhibit 35.) J&J then sent a letter to Omnicare enclosing written agreements pursuant to which J&J would pay Omnicare $300,000 to support a "program in helping Omnicare's consultant pharmacists overcome objections from physicians. This program will be especially effective in overcoming obstacles pertaining to resistance in prescribing Risperdal." (A copy of this letter, along with an e-mail to which it was attached, is attached hereto as Exhibit 36.)

45. In mid-October 1999, J&J and Omnicare formally entered into an "Initiative Partnership Agreement" pursuant to which J&J paid Omnicare $300,000 "to partially defray the cost to Omnicare in developing and marketing mutually acceptable broad-based formulary intervention initiatives and to assist Omnicare consultant pharmacists overcome obstacles and objections they encounter in implementing intervention programs." (A copy of this agreement, along with the cover letter with which it was enclosed, is attached hereto as Exhibit 37.) The cover letter enclosing the agreement noted that it "calls for educational assistance in overcoming objections and obstacles pertaining to the Risperdal Initiative." *See id.* In other words, rather than paying Omnicare a $300,000 strategic overlay under the 1997 Agreement, J&J instead paid Omnicare $300,000 in "educational funding" for the express purpose of inducing Omnicare to recommend that physicians prescribe Risperdal for their nursing home patients.

46. J&J's "ReView" Grants to Omnicare. During the early 2000s, Omnicare raised money from numerous drug manufacturers for its so-called "ReView" program. The ostensible purpose of the program was to develop "health management" programs that would identify nursing home patients for whom additional drugs could be prescribed. In a memorandum to Omnicare's Chief Executive Officer, Omnicare's Senior Vice President of Professional Services and Purchasing referred to the ReView program as the "one extra script per patient (ReView) program." (A copy of the memorandum containing this description is attached hereto as Exhibit 38.) One of the Omnicare ReView health management programs was "Behavior Management in Dementia—encompassing the appropriate use of antipsychotics and going from the typical to the newer and better tolerated atypical antipsychotics." (A copy of the Omnicare memorandum containing this statement is attached hereto as Exhibit 39.)

47. In January 2000, Omnicare requested that J&J make a $50,000 grant for the ReView program. (A copy of Omnicare's request is attached hereto as Exhibit 40.) In response, J&J made $251,000 in ReView grants to Omnicare during 2000. (A copy of an Omnicare spreadsheet showing these payments is attached hereto as Exhibit 41.) No other drug manufacturer paid Omnicare more than $75,000 for the ReView program in 2000. *See id.* In 2001, J&J observed that Omnicare's ReView program had "[g]enerated over 11,000 new prescriptions for antipsychotics." (A copy of the J&J presentation containing this statement is attached hereto as Exhibit 42. *See also* Exhibit 6 at OMNI-MA 040785.)

48. J&J's Sponsorship of Omnicare's Annual National Managers Meeting. During the period from 1999 through 2004, J&J paid Omnicare between $27,000 and $50,000 each year to "sponsor" Omnicare's annual national managers meeting at the Amelia Island resort in Florida. As Omnicare explained in requesting $45,000 from J&J for the 1999 meeting, Omnicare intended "to use these funds, to further advance our expertise in management activities including management of our clinical programs such as our Risperdal initiative." (A copy of the Omnicare letter containing this request is attached hereto as Exhibit 43.) In addition, J&J's sponsorship fees entitled J&J sales managers to play golf with Omnicare managers and to make presentations to Omnicare managers on why Omnicare should increase its purchases and recommendations of J&J drugs.

Omnicare's Purchases and Recommendations of J&J Drugs in Response to J&J's Kickbacks

49. As noted above, during the 1999 to 2004 period, Omnicare's annual purchases of J&J drugs nearly tripled to almost $300 million. This increase in purchases reflected increased prescribing of J&J drugs by physicians at nursing homes served by Omnicare, which in turn reflected the numerous "intervention" efforts Omnicare undertook in response to the kickbacks it received from J&J.

50. Even though Congress expressed clear concerns about the use of antipsychotics in nursing homes, and even though there is an intrinsic clinical risk in switching a stabilized patient from one antipsychotic to another, Omnicare devoted substantial effort to its intervention for Risperdal. Both Omnicare and J&J referred to this effort as Omnicare's "Risperdal

Initiative." The goal of the Risperdal Initiative was to generate as many Risperdal prescriptions as possible.

51. The Risperdal Initiative began in 1997, after J&J and Omnicare entered into the 1997 Agreement. In order to implement it, Omnicare distributed to all of its pharmacists around the country a so-called Patient Specific Therapeutic Interchange Protocol for Risperdal (the "Risperdal PSTI"). Copies of the 1997 and 1998 versions of the Risperdal PSTI are attached hereto as Exhibits 44 and 45. In the 1998 version of the Risperdal PSTI, Omnicare provided its pharmacists with suggested oral statements and written comments to use to encourage physicians to prescribe Risperdal, sometimes regardless of whether a given patient was already stabilized on another antipsychotic. *See* Exhibit 45 at OMNI-MA 881954-57.

52. In a summer 2000 memorandum, a J&J employee observed that Omnicare's ongoing Risperdal Initiative "has generated an all time market share high of 55.5% throughout the 1st quarter of 2000. This market share represents Omnicare's ability to persuade physicians to write Risperdal in the areas of Behavioral Disturbances associated with Dementia." (A copy of the memorandum containing this statement is attached hereto as Exhibit 46.) By the following spring, Omnicare had driven Risperdal's share of Omnicare's antipsychotic utilization to 58.5 percent.

53. In November 2001, Omnicare's Chief Clinical Officer distributed a memorandum to all Omnicare consultant pharmacists describing a nationwide "Risperdal Fax Campaign" in which Omnicare had asked physicians "for conversion to Risperdal® therapy." (A copy of this memorandum is attached hereto as Exhibit 47.)

54. Another means by which Omnicare implemented the Risperdal Initiative was through Physician Authorization Letters, or "PALs." (A copy of such a PAL is attached hereto as Exhibit 48.) As a J&J employee explained Omnicare's PALs, "Certain states allow for interchange letters to be sent to physicians which authorizes a substitution based on clinical data, formulary, etc. . . . to take place at the pharmacy level when a pharmacist[] receive[s] a prescription for a competitive medication. If the physician signs the authorization, the pharmacist will switch the medication at the pharmacy. . . . Where we have the opportunity, we are doing [this] in partnership with our external customer—Omnicare." (A copy of the e-mail containing this statement is attached hereto as Exhibit 49.) In a July 2001 internal report, J&J observed that two Omnicare pharmacies, "Jacobs Healthcare (16,000 beds) and Lawrence Weber (12,000 beds) started a PAL initiative with Risperdal in the month of May. The authorization letter requests a substitution to Risperdal from any new prescription of Zyprexa or Seroquel." (A copy of the report containing this statement is attached hereto as Exhibit 50.)

55. In 2002, J&J's Long-Term Care Group reported that, in a recent meeting, Omnicare's Director of Clinical Operations had "stressed that Risperdal is their primary intervention." (A copy of the document containing this statement is attached hereto as Exhibit 51.)

56. Omnicare ceased its Risperdal intervention activities only in or about 2003, when it became concerned about an increased risk of cerebrovascular events, including stroke, associated with Risperdal therapy in elderly patients. The Food & Drug Administration ("FDA") subsequently determined that

"Elderly Patients with dementia-related psychosis treated with atypical antipsychotic drugs are at an increased risk of death compared to placebo." By August 2005, the FDA required that all atypical antipsychotic drugs carry a black box warning of this risk.

57. Beginning in 1999 and continuing well into the 2000s, Omnicare also implemented a "Levaquin Initiative" on behalf of that J&J antibiotic drug. As J&J observed in July 1999, "Omnicare has begun its first prospective intervention with Levaquin during February of 1999. The overall goal of this program was to achieve a market share of over 50% in the quinolone market. Cipro had been the main anti-biotic of choice generating over 70% of the market (UTI). At the end of June, Levaquin national share for Omnicare was 41%." *See* Exhibit 12 at JNJ 301376. Ultimately, Omnicare far exceeded J&J's market share hopes with the Levaquin Initiative.

58. In July 2001, J&J's Long-Term Care Group noted that "Omnicare agree[d] to send PAL letters as well as a universal mailing in August/September to promote Levaquin for the upcoming respiratory season." Exhibit 50 at JNJ 289773.

59. In September 2001, J&J observed that "Omnicare has grown Levaquin Share from 19.2% in 4th Quarter of '98 prior to the Levaquin Initiative to 66.4% in 2Q '01. In this same time period Cipro has gone from 80% + to the 28% range." (A copy of the document containing this statement is attached hereto as Exhibit 52.) By October 2001, Omnicare's Levaquin Initiative had generated a 71.1 percent share for the J&J drug at Omnicare pharmacies.

60. In a June 2002 e-mail concerning Omnicare's Levaquin Initiative, a J&J manager noted that Omnicare had achieved a "19% share gain in 5 months due to Omnicare pharmacist's physician calling." Exhibit 49.

61. In another June 2002 e-mail, a J&J Long Term Care Business Manager reported: "I wanted to share some great news. In January of this year I worked with Cedar Rapids, IA to do Therapeutic interchange letters for Levaquin. They implemented them in Jan while they had a share of 70%. Then in March of '02 they started calling the physicians back. They would fill one script of Cipro and then call the doctor and if they would not return the call after 2 days they would stay on Cipro but the majority of the physicians would call back and let Omnicare know it was ok to switch to Levaquin. So in May of 02 they have a share of 89% while Cipro is down to 11%." (A copy of the e-mail containing this statement is attached hereto as Exhibit 53.)

62. Omnicare also undertook "intervention" programs for other J&J drugs in response to J&J's kickbacks. In July 2001 and July 2002 contract compliance certifications to J&J pursuant to the 2000 Agreement, Omnicare represented that it was conducting "Product Specific Active Intervention Program[s]" for four J&J drugs: Risperdal, Levaquin, Procrit, and Ultram. Omnicare further represented that it was conducting "General Active Intervention Program[s]" for other J&J drugs. (Copies of these contract compliance certifications are attached hereto as Exhibit 54.)

False Claims

63. As a result of J&J's kickbacks to Omnicare, as alleged above, J&J caused Omnicare to submit false claims to Medicaid for drugs dispensed to residents at nursing homes. Examples of such false claims are attached hereto in Exhibit 55.

Count One

(False Claims Act, 31 U.S.C. § 3729(a)(1) (1986))

64. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

65. As a result of J&J's kickbacks to induce Omnicare to purchase, order, or recommend or arrange for the purchasing or ordering of J&J drugs, in violation of the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2), all of the claims J&J caused Omnicare to present to Medicaid for those drugs are false or fraudulent. Accordingly, J&J knowingly caused to be presented false or fraudulent claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1) (1986).

66. By virtue of the false or fraudulent claims J&J knowingly caused to be presented, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false claim.

Count Two

(False Claims Act: 31 U.S.C. § 3729(a)(1)(B) (2009))

67. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

68. J&J knowingly caused Omnicare to make or use false records or statements material to false or fraudulent claims paid or approved by the Government, in

violation of 31 U.S.C. § 3729(a)(1)(B) (2009). The false records or statements were Omnicare's false certifications and representations of full compliance with all federal and state laws and regulations prohibiting fraudulent acts and false reporting, including but not limited to the anti-kickback statute, 42 U.S.C. § 1320a-7b.

69. By virtue of the false records or statements J&J caused Omnicare to make or use, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false claim.

Count Three

(False Claims Act, 31 U.S.C. § 3729(a)(3) (1986))

70. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

71. J&J conspired with Omnicare to pay kickbacks to Omnicare in violation of the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2), to induce Omnicare's purchase of drugs from J&J, thereby causing all of Omnicare's claims to Medicaid for those drugs to be false or fraudulent. Accordingly, J&J conspired to defraud the United States by getting false or fraudulent claims allowed or paid, in violation of 31 U.S.C. § 3729(a)(3) (1986).

72. By virtue of the false or fraudulent claims J&J conspired to get allowed or paid, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false claim.

Count Four
(Unjust Enrichment)

73. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

74. The United States claims the recovery of all monies by which J&J has been unjustly enriched, including profits earned by J&J because of illegal inducements J&J paid to Omnicare.

75. By obtaining monies as a result of its violations of federal and state law, J&J was unjustly enriched, and is liable to account and pay such amounts, which are to be determined at trial, to the United States.

76. By this claim, the United States requests a full accounting of all revenues (and interest thereon) and costs incurred by J&J on sales to Omnicare, and disgorgement of all profits earned and/or imposition of a constructive trust in favor of the United States on those profits.

Prayer For Relief

WHEREFORE, the United States demands and prays that judgment be entered in favor of the United States as follows:

1. On Counts One, Two, and Three under the False Claims Act, for the amount of the United States' damages, trebled as required by law, and such civil penalties as are required by law, together with such further relief as may be just and proper.

2. On Count Four for unjust enrichment, for the damages sustained and/or amounts by which J&J retained illegally obtained monies, plus interest, costs, and expenses, and such further relief as may be just and proper.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

Dated: January 15, 2010

By: /s/ Gregg Shapiro

GREGG SHAPIRO
CHRISTINE WICHERS
Assistant United States Attorneys
One Courthouse Way, Suite 9200
Boston, MA 02210
gregg.shapiro@usdoj.gov
(617) 748-3366

TONY WEST
Assistant Attorney General

JOYCE R. BRANDA
DANIEL R. ANDERSON
LAURIE A. OBEREMBT
Attorneys, Civil Division
United States Department of Justice
P.O. Box 261, Ben Franklin Station
Washington, D.C. 20044

EXHIBIT 7

Omnicare – Current Analysis & Recommendations 9/25/01

Current Situation

* * *

- I made it clear to Dan that Levaquin & Risperdal were linked and we had to get both of these situations resolved in order to still have an agreement with Omnicare.
- Joel Gemunder, President of Omnicare contacted David Norton, Pres. Of Janssen on Friday, Sept 18 to say that Omnicare would continue to support Risperdal.

* * *

- Omnicare currently receives a 15% rebate on Levaquin PO for a share ≥ to 50%
- Omnicare currently operates off the old Levaquin IV matrix with < 50% at 0%, ≥ 50% to 70% equals 5%, > 70% equals 7% rebate

* * *

D. Market Segments – Comparisons of Market Share & Others Facts

* * *

- Omnicare has grown Levaquin Share from 19.2% in 4th Quarter of '98 prior to the Levaquin Initiative to 66.4% in 2Q '01. In this same time period Cipro has gone from 80% + to the 28% range

* * *

EXHIBIT 8

SUPPLY AGREEMENT

BETWEEN

OMNICARE, INC.
2800 Chemed Center
255 East 5th Street
Cincinnati, OH 45202

Att: Dan Maloney, Director of Purchasing

REDACTED

Referred to as: "Manager"

AND

Johnson & Johnson Health Care Systems Inc.
425 Hoes Lane
P.O. Box 6800
Piscataway, New Jersey 08855-6800
Att: Contract Administration

REDACTED

Referred to as "Supplier"
DATE: March 31, 1997
TERM: From: April 1, 1997
To: March 31, 2000

CONTRACT NUMBER: [Number to be assigned]

SIGNATURES

MANAGER

By /s/ Dan Maloney 4/8/97
Name: Dan Maloney Date
Title: Director of Purchasing

SUPPLIER

By: /s/Dennis A. Sherrill 4/8/97
Name: Dennis A. Sherrill Date
Title: Corporate Account Director

By /s/ Sanjay P. Shah 4/8/97
Name: Dennis A. Sherrill Date
Title: Manager, Business Analysis

PERFORMANCE MEASUREMENT AND REBATE ELIGIBILITY

A rebate shall be paid on each Product included in Product List (Exhibit A according to and if the following performance criteria are met quarterly

1. This Agreement pilots a new concept for Supplier to evaluate performance on basis of DACON. (Daily Average Consumption). Consequently, Supplier retains the right to modify the performance evaluation measurement based on DACON after the first year of this Agreement. In this case, both parties will develop a mutually acceptable performance measurement criteria or else terminate this Agreement as per the "Term" provisions under Article 3 of General Terms and Conditions.

2. Annual Strategic Product Performance Rebate shall be earned on Strategic Products that have an Active Intervention Program (AIP) or Appropriate Use Program (AUP) applied in their favor.

   a) An additional rebate of 1% off Contract Price shall be earned on the annual utilization of select Strategic Products described on Schedule D. This rebate shall be in addition to any quarterly rebates earned as per the "Performance Measurement and Rebate Matrix"

grid. The rebate shall be paid in accordance of Article 5 "Contract Prices and Rebates"' once Supplier has evaluated Manager's satisfaction of meeting the performance criteria described in Exhibit D "Schedule of Qualifying Interventions". The performance shall be evaluated in aggregate at the end of each Contract Year.

b) Supplier views the "Strategic Product Performance Rebate" as a year-end bonus, recognizing successful completion of a Contract Year and the relationship between the two parties. In case this Agreement is terminated in middle of any year, Suppler will not be obligated to pay Manager any "Strategic Product Performance Rebate".

c) The AIP/AUP initiatives will be developed jointly by the two parties and described under Exhibit D "Schedule of Qualifying Interventions" as described in paragraph "D" of this section.

d) At the time this Agreement is executed, the Strategic Product Performance Rebate shall be considered for Supplier's Strategic Products for Chronic Pain Management (DURAGESIC® and ULTRAM®), Atypical Antipsychotic (RISPERDAL®) and Anti-Infective (FLOXIN®) IF each one of these products meet or exceed the performance level described in Exhibit D on an aggregated annual basis evaluated at the end of each Contract Year.

e) As and when provided in the Schedule of Qualifying Interventions (Exhibit D), each

Strategic Product must have an Active Intervention Program, applied by Manager in the favor of the Product, to be eligible for Strategic Product Performance Rebates on that Strategic Product. Upon written approval of Supplier, an Appropriate Utilization Program may fulfill this requirement. Supplier hereby approves as an AIP each Program set forth on the Schedule of Qualifying Interventions (Exhibit D). It is the responsebility of Manager to provide Supplier with notice that AIP/AUP programs are in effect, together with a brief description thereof. Manager agrees to meet with Supplier within 30 days of executing this Agreement to develop a business plan that includes the initial Schedule of Qualifying Interventions. A meeting shall occur every quarter between the two parties to review the progress on the business plan. The business plan and the performance goals for earning the Strategic Product Performance Rebate may be revised on an annual basis:

f) Upon written approval of Supplier, an Appropriate Utilization Program may fulfill this requirement. Supplier hereby approves as an AIP each Program set forth on the Schedule of Qualifying Interventions (Exhibit D). It is the responsibility of Manager to provide Supplier with notice that AIP/AUP programs are in effect, together with a brief description thereof. Manager agrees to meet with Supplier within 30 days of executing this Agreement to develop a business plan that includes the initial Schedule of Qualifying Interventions. A meeting shall occur every

quarter between the two parties to review the progress on the business plan. The business plan may be. revised on an annual basis.

3. At a future date, both parties shall meet and expand the Schedule of Qualifying Interventions (Exhibit D) to include other Strategic Products. At that time, Supplier will consider expanding the Strategic Product Performance Rebate to cover these additional Strategic Products. In anticipation of future AIP/AUP, Supplier offers Manager rebates on Strategic Products that do not have AIP/AUP at the time this Agreement shall be executed.

* * *

EXHIBIT 10

SUPPLY AGREEMENT

BETWEEN

Omnicare, Inc.
100 East River Center Blvd.,
Covington, KY 41011

Attn: Dan Maloney
Director of Purchasing

REDACTED

Referred to as: "Manager"

AND

Johnson & Johnson Health Care Systems Inc.
425 Hoes Lane
P.O. Box 6800
Piscataway, New Jersey 08855-6800

Attn: Contract Administration

REDACTED

Referred to as "Supplier"

TERM: From: April 1, 1999
To: March 31, 2004

CONTRACT NUMBER: HCS0068

SIGNATURES

MANAGER

By /s/ Dan Maloney [illegible] Date

Dan Maloney
Director of Purchasing

SUPPLIER

By /s/ Bruce Cummins 3/26/00 Date
Bruce Cummins
Corporate Account Director

By /s/ Martine Grant 3/29/2000 Date
Martine Grant
Manager, Account Development

* * *

5. Price

Pricing shall be at Distributor List Price (DLP) at the time of sales less 0.05% with the exception of Procrit which will be at DLP at time of sale minus 5%. In addition, Manager can earn rebates on all Products based on the requirements outlined in the PERFORMANCE REBATE MATRIX. Payment of such rebates will follow procedures outlined in Article 6 "Rebate Policies".

a) Annual Product Performance Incentive

i) An Annual Product Performance Incentive of 2% shall be earned on total contracted sales of Products described in Exhibit A, with the exception of Levaquin® and Procrit®. This Annual Product Performance Incentive shall be in addition to any quarterly rebate earned as per the "Performance Measurement and Performance Rebate Matrix". It shall be paid in accordance of Article 6 "Rebate Policies" once Supplier has evaluated Manager's satisfaction of meeting the performance criteria described in "Schedule of Qualifying Interventions". The performance requirements will be determined by both parties, during the

quarter preceding the anniversary date of this Agreement for the next Contract Year. The performance shall be evaluated in aggregate at the end of each Contract Year.

ii) Supplier views the "Annual Product Performance Incentive" for full Contract Year. In case this Agreement is terminated prior to completion of a contract year, Supplier will not be obligated to pay Manager any "Annual Product Performance Incentive", for such partial contract year.

iii) The AIP/AUP initiatives will be developed jointly by the two parties and described under "Schedule of Qualifying Interventions".

iv) At the time this Agreement is executed, the Annual Product Performance Incentive shall be considered for Supplier's Products described in Exhibit A with the exception of Levaquin® and Procrit®, if each one of the conditions described in the "Schedule of Qualifying Active Intervention Programs" are met.

v) As and when provided in the "Schedule of Qualifying Active Intervention Programs", each Strategic Product must have an Active Intervention Program initiative applied by Manager in the favor of the Product, to be eligible for Strategic Product Performance Rebates on that Strategic Product except Procrit. Upon written approval of Supplier, an Appropriate Utilization Program may fulfill this requirement. Supplier hereby approves the AIP/AUP initiatives set forth on the Schedule of Qualifying Active Inter-

ventions. It is the responsibility of Manager to provide Supplier with notice that AIP/ AUP programs are in effect, together with a brief description thereof. A meeting shall occur every quarter between the two parties to review the progress on the business plan. The business plan and the performance goals for earning the Annual Product Performance Initiative may be revised on an annual basis.

* * *

EXHIBIT 11

Omnicare, Inc.

Date: July 19, 1999

Prepared by:

Bruce Cummins
Long Term Care Business Group,
Account Director

Colleen Jones
Long Term Care Business Group,
Business Manager

Long Term Care

Coordinating RESOURCES FOR LONG-TERM CARE

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Appendix 28

I. Executive Summary

Omnicare, Inc. is the largest independent provider of professional pharmacy and related services for long term care initiatives such as nursing homes, retirement centers, and other institutional facilities. Omnicare services 617,300 residents in 8,600 facilities across the United States. This represents over 100 pharmacy locations and 30% of the long-term care market. Omnicare is headquartered in Covington, Ky.

* * *

Despite its growth trend of acquiring independent pharmacies, Omnicare has quickly taken control of its business units' purchasing functions. Omnicare has a strict corporate policy of compliance with therapeutic substitution, interchange, and dispensing of Omnicare Select products. It is through this venue that Omnicare is able to move market share of selected products. An example is the success that Levaquin® has had at Omnicare. Levaquin has jumped from a 12% share in January of 1999 to 41% in June for the entire anri-infective market.

* * *

Formulary/Clinical Interventional Programs

Omnicare's formulary plays a large part in both increasing the profitability of Omnicare, and offering service to post-acute care facilities. Omnicare subscribes to the theory that pharmaceuticals remain the most cost-effective means of treating most chronic ailments in the elderly. Omnicare has developed the first clinically based drug formulary tailored to the unique needs of the elderly. During 1999 Omnicare released the seventh edition of its "Geriatric Pharmaceutical Care Guidelines." Omnicare utilizes

the Philadelphia College of Pharmacy, noted for its expertise in long-term care, to rate over 700 drugs in 100 therapeutic classes as clinically Preferred, Acceptable, or Unacceptable.

Omnicare then considers the Philadelphia College of Pharmacy clinical recommendation, along with the cost of the drug to the payer and acquisition drug cost to Omnicare, to determine the drugs for which it implements therapeutic interchange, substitution, and disease state management programs. Omnicare's goal is to increase the clinical effectiveness, decrease the drug-related side effects, and decrease the cost to the payer, while increasing the profitability of Omnicare pharmacies.

Omnicare has over 800 consultant pharmacists who review patient charts monthly and make recommendations based on the formulary and Omnicare programs for physicians. Pharmacists' recommendations are accepted more than 80% of the time. Consultant pharmacists actively meet with physicians or correspond with them through the mail to obtain approval to make appropriate medication switches for all their applicable nursing home patients. Pharmacists are also responsible for in-servicing the nursing staffs on pharmaceutical and patient care. Omnicare consultant pharmacists receive monthly "report cards" showing them their success in obtaining goals for therapeutic programs. Thus, Omnicare is able to drive market shares on products that increase clinical effectiveness, decrease costs to the systems in which they operate, and increase profits to Omnicare.

* * *

Omnicare currently has nearly 1000 clinical pharmacists that meet regularly with physicians and

medical directors to review each resident's progress and drug regimen. By choosing a product with fewer dollar signs in the Preferred or Acceptable class, a physician can provide cost-effective therapy with the best possible clinical outcome. Omnicare has 18 active Patient Specific Therapeutic Interchange Programs in effect. The success of these interchanges determines the rating the consultants get on their report cards. Mark Lehman and Gary Irwin develop a "tool box" complete with pharmacologic drug information and interchange specifics to include charting tools and letters to physicians. The consultant pharmacists are active in having physicians sign therapeutic interchange forms that allow pharmacists to review charts and make switches without having to consult with the physician. Consultants receive report cards from Omnicare showing their success with Omnicare Select Products and share data on drugs in active therapeutic programs or part of disease state management programs. The PSC Formulary Champions work with the consultants to achieve Omnicare goals on specific drugs. Omnicare states that this effort has helped the company lower the cost of pharmaceutical care to the elderly by approximately 16%. New therapeutic classes will be selected on an annual basis.

When analyzing market share and formulary status, clinically and economically, there does not seem to be a direct correlation between the clinical rating (Preferred or Acceptable), dollar rating ($-$$$$$$), and market share.

Omnicare is able to drive share on multisource products by utilizing the Toledo Heartland facility as a wholesaler and only stocking the one preferred generic.

VIII. Putting It All Together

Charter Statement

J&J supplies high-quality products and jointly created clinical and business programs to Omnicare that aid Omnicare in achieving corporate goals and objectives.

Four Best Opportunities

Regain Risperdal® share of atypical APS market through interventional programs and outcomes research.

Execute interventional program to switch propoxyphene orders to Ultram®. Implementation of the National Pain Initiative as a Disease State Management Program.

Execute Levaquin® intervention quinolone program.

Establish relationships with Coromed and IBAH for outcome based research opportunities and generate stability data for Risperdal® 5mg for Heartland repackaging facility.

Three Best Goals

Become Omnicare's resource for pain, behavior management, GERD, and anti-infective therapy through clinical expertise, clinical interventional tools appropriate to LTC, outcomes data, and value-added services.

Partner to assist with reimbursement Medicaid/ Medicare/Prospective Payment issues utilizing JPI reimbursement managers and JJHCS government affairs directors.

Implement outcomes projects in APS, motility, and anti-infectives.

Primary Revenue Target

Omnicare will purchase $100 million from the J&J Pharmaceutical Group.

Single Best Opportunity

Risperdal® preferred status on Omnicare's Geriatric Guidelines. To continue this formulary status and to implement Risperdal® PSTI program at all regional sites. Risperdal has the largest dollar potential and the most to lose.

Focus Investment *(Resources Needed)*

APS programs geared to the LTC patient population

Funding for Ultram®/propoxyphene intervention

Funding for Levaquin® interventional program

Heartland repackaging project/Coromed research projects.

Stop Investment

Monies spent on consultant resources without focus on Omnicare corporate will be money poorly invested.

EXHIBIT 16

STRAUSS & TROY
A Legal Professional Association

Founded in 1953

The Federal Reserve Building
150 East Fourth Street
Cincinnati, Ohio 45202-4018
Telephone: 513-621-2120
Facisimile: 513-241-8259
www.strauss-troy.com

Northern Kentucky Office
50 East RiverCenter Boulevard
Suite 1400
Covington, Kentucky 41011

* * *

June 25, 2003

U.S. Food and Drug Administration
Thomas G. Harkness, Special Agent
901 Warrenville Rd.
Suite 350
Lisle, IL 60532

U.S. Department of
Health & Human Services
James J. O'Leary, Special Agent
Post Office Box 81020
Chicago, IL 60681-0020

Re: Omnicare
David Kammerer, Relator

Gentlemen:

The following Disclosure Letter is further to Relator's conversations with Mr. Harkness over the past several months concerning the referenced matter and the recent related meeting in Cincinnati, Ohio held on June 2, 2003 attended by Messrs. Harkness and O'Leary, on behalf of the FDA and HHS, respectively, Mr. Kammerer and his counsel, Mr. Atkins. Relator has asked his counsel to prepare this Disclosure Letter containing information which Relator has provided to him and which is within Relator's firsthand knowledge. A significant amount of this information has previously been disclosed by Relator to Messrs. Harkness and O'Leary in the June 2 meeting, and included references to some of the documentary data as below identified.

This Disclosure Letter is intended to comply with the disclosure requirements of the False Claims Act and to establish Relator's qualification and suitability as an original source and Qui Tam Plaintiff in a False Claim Act Complaint, which Relator intends to file. That complaint will be filed in the appropriate federal jurisdiction and will relate to Omnicare (OC) activities throughout the United States which concern specifically, though not exclusively, Omnicare requests for reimbursement (RFR) in connection with the filling of prescriptions, covered in whole or in part by Medicaid, for the brand drug Zantac® and its generic FDA equivalent Ranitidine.

* * *

- Relator's interaction with and reporting to management
    - Relator reported to Tim Bien. Mr. Bien reported to Joel Gemunder, CEO and President of Omnicare.

- Relator interacted with management principally through numerous, sometimes daily, meetings with Bien regarding profit (from purchasing, clinical initiatives and/or Medicaid reimbursement) and pharmacies' compliance with Omnicare directives. Often, Relator and Bien, who were in the same building, would talk 10 or more times a day about these matters.
- Relator would also discuss these issues with Joel Gemunder and Pat Keefe (COO and number 2 man in Omnicare). David Froesel, CFO is the number 3 man in the company and Tim Bien is the number 4 man in the company. Occasionally, Gemunder (or his office) would call Relator at home (sometimes as late as 11:00 p.m.) to discuss the foregoing matters. Relator's discussions with Keefe tended to focus on which pharmacies weren't doing a good job in an initiative (like Ranitidine) or what was happening with Medicaid in a particular state. Relator also had conversations with RVPs (regional vice-presidents), RCDs (regional clinical directors) and OMs (operations managers) regarding their pharmacies' progress on initiatives or some other strategies as to how their particular pharmacies could make more money.

- Relator's overall company responsibility
  - Relator's job was primarily to figure out how Omnicare could make more money and then monitor the pharmacies after the strategy was approved by Bien, and occasionally reviewed by either or both Keefe and Gemunder.

- Relator's financial analysis—H2 drugs
  - Relator developed a model to determine which drug (Ratinidine, Axid, Pepcid/ Famotidine) and which form of the particular drug (tablet or capsule) was the most profitable for each state where Onmicare had operations. The model was developed using Omnicare "dead net" acquisition cost for each drug, the Medicaid reimbursement for each state, and the number of units (typically 60 tablets or capsules) for a one-month's prescription. The "dead net" acquisition costs were highly confidential and never shared with the government, other third parties or with Omnicare pharmacies. Omnicare's "dead net" acquisition costs were only available to Bien (and a few people in the purchasing department), Keefe, Gemunder and Relator. Relator's profit forecasts were based on how much Omnicare market share could be moved from one drug (or drug form) to another drug (or drug form). Relator also regularly made company wide and regional revenue forecasts for a particular initiative.
- Contact by Thomas Harkness
  - Relator was contacted by Thomas Harkness (TH) of the FDA criminal investigation by telephone on April 28, 2003 and Relator returned his call the next day. He was investigating Omnicare, with particular interest in the Ranitidine classification of drugs. He told Relator the FDA was investigating Omnicare because of the sudden utilization being shifted from tablets to capsules, which caused complaints (he did not identify the source of

complaints) about Omnicare's shifting in utilization. He said the FBI and HHS were also investigating Omnicare. His FDA interest was to determine if there were "technical misbrandings" of Ranitidine—that is, changing from tablets to capsules without a new prescription. He told Relator the investigation had been going on for approximately 10 months and centered around Omnicare's Illinois pharmacies (Enloe, Home, and Jacobs). He knew Relator was a former Omnicare employee (from an Omnicare document he had reviewed in his investigation) and asked if Relator could tell him who was the person most familiar with Omnicare's policies, practices, procedures and pricing of the drug, Ranitidine. Relator told him he was that person (while employed at Omnicare) responsible for identifying strategies (and getting upper managements' approval) for everything that went on with Ranitidine. He then asked if Relator would meet with him to discuss the matter, and perhaps what Relator knew about Omnicare's dealings with Geneva. Relator agreed to meet with him and to provide what information Relator had relevant to his investigation. He asked Relator not to let Omnicare know Relator was talking to him. Relator asked him if this was part of a false claim case, he said no, but it may lead to one sometime down the road. Relator then contacted Strauss & Troy, the law firm that previously had performed legal work for Relator, unrelated to the matters raised in TH's phone call.

- The FDA/HHS h2 drug investigation:

Generally, if the physician prescribes Zantac®, pharmacies are legally permitted to switch from the brand Zantac® (which is Ranitidine tablets) to the generic Ranitidine tablets without a new prescription, unless the prescription is written specifically for the brand Zantac® and the prescription contains the notation "dispense as written" (DAW) or "brand medically necessary" (BMN). Zantac® and Ranitidine tablets are FDA A-B rated. This means that the brand name and generic of the drug in tablet form is deemed by the FDA regulations to be pharmaceutically and therapeutically equivalent. But generic Ranitidine tablets versus generic Ranitidine capsules are not A-B rated under the applicable FDA regulations. In order to change from Ranitidine tablets to Ranitidine capsules, the pharmacy must have a new prescription (per telephone from the physician or a written prescription) to change from tablets of Ranitidine to capsules of Ranitidine and vice versa.

It was apparent to Relator that TH was focusing primarily upon and trying to understand the Omnicare "Ranitidine" policy considerations and strategies that determined how and under what circumstances its Illinois pharmacies would be ordered to switch between the tablet and the capsule form of Ranitidine, once the change from Zantac® brand to Ranitidine tablet had been made by its company owned or controlled pharmacies.

- Omnicare owned/controlled pharmacies:

Omnicare owns or controls approximately 150 pharmacies in 47 states. These pharmacies are free standing and most are operated under the name established before Omnicare gained ownership or control.

- Relator's responsibilities for profitability at Omnicare:

Relator's Omnicare job responsibilities with respect to Ranitidine were primarily devoted to collecting and analyzing our pharmacy drug dispensing data and then to develop financial spread sheets to show whether Omnicare's profitability could be increased by switching the form of Ranitidine dispensed, say from tablets to capsules. If profitability increased by such a change, then management, principally Tim Bien, would approve the initiative and a directive would be given to our Regional Vice-Presidents, Regional Clinical Directors, Operations Managers (in house managers at each pharmacy) and Consultant Coordinators (field pharmacists who relate to physicians, facility administrators, nurses) to make the switch. In most cases the periodic switches from Ranitidine tablets to Ranitidine capsules were done without a new physician prescription authorizing the change from tablet form to capsule form. The memorandum (directive) from Bien, dated May 9, 2002, which Relator previously supplied to you and which TH apparently also had obtained previously from another source as well, exemplifies their type of directive. At the next meeting, now scheduled for July 8, Relator will enlarge upon the significance of this document in perhaps greater detail than discussed in the meeting on June 2nd.

The following comments are also illustrative of Relator's direct involvement and first hand knowledge of facts and events that appear to be directly related to and explanatory of the current FDA/HHS investigations of Omnicare:

- Omnicare directives are profit driven. The form of the generic drug, to be dispensed at any given

time, is the form that currently will produce the largest profit margin for OC. These directives are implemented in the relevant pharmacies, in most instances, without first obtaining a new Rx from the physician to change from one form of the Ranitidine (say, tablets) to the then more profitable form (say, capsules), as above.

- It was Relator's primary responsibility to keep current information on which region (state, for example) was then using reimbursement formulas that would give OC the greatest profit and to prepare financial spread sheets to demonstrate OC profitability over time if the change in form of the generic was made. Usually, OC had advance notice of effective dates when a reimbursement formula would be increased from tablets to capsules by the state or federal government. OC would try to make the switch to the more profitable form of the generic a month or so in advance of the effective date of the new reimbursement formula. For, example, if Ranitidine tablets had a unit MAC (maximum acquisition cost = state maximum reimbursement to the OC pharmacy) or a FUL (federal upper limit = federal maximum reimbursement to OC) about to be implemented for, say, .34¢ and there was no MAC or FUL on the capsule, which was reimbursed at, say, $1.33 (AWP (average wholesale price) of $1.48 less 10%), then OC would direct its pharmacies to switch to capsules when filling Ranitidine Rx to achieve greater profitability.
- The lack of a MAC or FUL for the Ranitidine capsules at a particular time was the result of there being only one manufacturer of the

capsules, whereas there were several competing manufacturers of the tablets. The governmental agency would set the MAC and/or FUL for the tablets as an approximation of the pharmacies' acquisition cost per unit (per tablet). OC would not divulge its "dead net" acquisition cost of the drug to the government. The "dead net" acquisition cost was less than the cost figure OC gave to its pharmacies. The following tables for Ranitidine are an illustration:

Claim for Ranitidine Reimbursement

Quantity (1 month)	Medicaid pay per unit	Total reimbursement
Tabs. 60 (unit price x 60 = month supply)	.34¢ (FUL) = $20.40 + dispensing fee of $4.00	$24.40
Caps 60 (unit price x 60 = month supply)	$1.48 <10%> = $1.33 x 60 = $79.80 (no FUL; there are MACs in some states) = $79.80 + dispensing fee of $4.00	$83.80 - $24.40 = $59.40 positive variance

Profitability Increased by Switching from Ranitidine Tab to Cap

OC Cost per tab	.0218¢	.0218¢ x 60 = $1.31 (OC script cost)	$24.40 - $1.31 = $23.09 profit
OC Cost per cap	.095¢	.095¢ x 60 = $5.70 (OC script cost)	$83.80 - $5.70 = $78.10 profit

In certain states, the increased profitability to Omnicare per prescription when it switched from Ranitidine tablets to Ranitidine capsules ($78.10 - $23.09) was $55.01 (this could be higher or lower depending on the exact reimbursement formula of a particular state.)

- Omnicare on occasion would pre-order a particular form of Ranitidine and then instruct its pharmacies to fill only with either tablets or capsules (whichever was the most profitable for OC at any given time)—sometimes there were attempts to cover this action by sending to the

physician a "notice" (somewhat the reverse of the "Physician Authorization Letter" (PAL)) putting the onus on the physician to say "no", or otherwise the patient would be switched at OC's discretion to another form of Ranitidine at some future date. The physician had little objection, so long as the drug was being administered. In some states, depending on the reimbursement and profit opportunities, OC would send a directive to the pharmacies to "turn off the PAL", the effect of which was to have the Ranitidine cap (the result of a previous switch by OC from the original tab form) revert again to the tab form which increased OC profitability and had the additional effect of increasing the Pepcid/ Famotidine market share, as explained in the next paragraph.

- Depending upon the particular state reimbursement formula (for Medicaid covered prescriptions only), OC strategy for such Medicaid patient prescriptions was one of the following:

  1. Switch Ranitidine tabs to Ranitidine caps (by means of a PAL or without first obtaining a new Rx from the physician) when OC profitability would be increased by the switch.
  2. When there had been a previous OC switch from an original Rx for Pepcid to Ranitidine caps (either without any new prescription from the physician, or by means of a PAL), OC would "turn off the PAL;" this would cause the now more profitable Pepcid utilization to increase because the original prescription for Pepcid would be reinstated via "turning off

the PAL," OC would often fill an original Pepcid prescription with Ranitidine caps, as above, when it increased OC profitability.

3. Stay with Ranitidine tabs, when more profitable for OC.

4. Switch a non-Zantac®/Ranitidine RX to Ranitidine caps (as above, in the case of Pepcid) when the switch increased OC profitability.

Types of initiatives:

1. Health management—encouraging physicians to add prescriptions, as clinically appropriate. OC would get the necessary prescription from the physician; (e.g., Spironolactone for congestive heart failure; Miacalcin® for osteoporosis; and, Aricept® for Alzheimer's syndrome.)

2. Therapeutic interchange (TI)—to move market share from one drug to another drug that has equivalent therapeutic effects. PAL letters were used to help facilitate moving market share. Most of the time TIs saved the payor money and they were always more profitable for Omnicare.

   a. Examples of switching (via new Rx or PAL) to an equally efficacious drug that saves the payor money and simultaneously increase profit for Omnicare: Prilosec® to Prevacid®; Zyprexa® to Risperdal®; and Zocor® to Lipitor®.

   b. Examples of switching (via new Rx or PAL) to a more efficacious drug that costs the payor (Medicaid) more money and

increases profitability for OC: Haloperidol to Risperdal®; and, Captopril to Zestril®.

c. Examples of switching to a higher costing drug (for the payor, Medicaid) but with no improved efficacy: Vioxx® to Celebrex®; Monopril®, Mavik® and Lotensin® to Zestril®; and Ranitidine tablets to Ranitidine capsules. By making these particular drug switches, Omnicare increased both its revenues and its profits.

3. Switching to a different form of a drug (tabs to caps; caps to tabs; liquid to solid; solid to liquid) in order to increase Omnicare reimbursement from Medicaid, which in turn increased profitability. Examples: Celexa® 10 mg. to Celexa® 10mg/5ml (Ohio only); Fluoxetine caps to Fluoxetine tabs; and, Ranitidine tabs to Ranitidine caps.

4. Other initiatives:

a. Generic substitution—This occurs when a prescription is written for a brand drug and the pharmacy substitutes the generic equivalent form. The substitution is made as soon as an A-B rated generic is on the market (unless the physician includes D.A.W. [dispense as written] on the prescription.

b. Identifying and buying/dispensing the most profitable generic manufacturer (considering revenue and cost).

c. Selected use of half-tabs and two's for one. For example, if a prescription was written for Buspirone 15 mg, Omnicare, instead of

dispensing 1 tab of Buspirone 15 mg, would dispense 2 tabs of Buspirone 7.5 mg. This switch was done to increase Omnicare revenue and profit. There was a MAC on Buspirone 15mg tab, but no MAC on the Buspirone 7.5 mg which made the "2 for 1" switch much more profitable for Omnicare and much more expensive for the payor, Medicaid.

* * *

EXHIBIT 17

Omnicare, Inc.

Date: March 10, 2003

Prepared by:
Chuck Chartier
Long Term Care Business Group, Account Director

Matt Lawrence
Long Term Care Business Group, Account Manager

* * *

Putting the *Omnicare Guidelines*® into practice

Omnicare's Formulary Management Program uses the *Omnicare Geriatric Pharmaceutical Care Guidelines*® as a tool to educate physicians on reasons to choose Preferred drugs over less effective or less cost-effective alternatives. Using therapeutic interchange protocols, the Omnicare Consultant Pharmacist can:

- help prescribers choose the best clinical therapy for each individual resident
- offer guidance on how to switch from one drug to another in the way most beneficial to the patient
- reduce the variability of prescribing, so that every resident in a skilled nursing facility receives optimal care and opportunity for payer savings

Omnicare has over 900 consultant pharmacists who review patient charts monthly and make recommendations based on the formulary and Omnicare programs for physicians. Pharmacists' recommendations are accepted more than 80% of the time. Consultant pharmacists actively meet with physicians

or correspond with them through the mail to obtain approval to make appropriate medication switches for all their applicable nursing home patients. Pharmacists are also responsible for in-servicing the nursing staffs on pharmaceutical and patient care. Omnicare consultant pharmacists receive monthly "report cards" showing them their success in obtaining goals for therapeutic programs. Thus, Omnicare is able to drive market shares on certain products that increase clinical effectiveness, decrease costs to the systems in which they operate, and increase profits to Omnicare.

* * *

V. Situation Appraisal Summary

A. Strengths

Omnicare now has the critical mass and looks to now be the dominant player in the market. They will continue to grow and become an even more dominant force. They purchase more dollars in J&J products than any other pharmaceutical manufacturer. The diversity and breadth of J&J positions us to be a resource to Omnicare beyond the portfolio of products we represent. We have the resources to contribute to Omnicare's organizational and business issues; for example, our expertise in marketing, sales training, risk assessment reimbursement, and performance measurement. The Long Term Care Group has a signed performance driven contract in place until the end of March, 2004. We will be working to negotiate a new agreement to be in place by the end of the second quarter 2003. The current contract includes rebate opportunities or other discounts on Risperdal®, Reminyl®, Duragesic®, Levaquin®, Ultracet®, Ditropan XL®, Aciphex® and Procrit®.

* * *

D. Vulnerability

This account is the largest in the Long Term Care Group. It now controls over 50% of the market and is likely to grow larger. We need to ensure we maintain a strong positive relationship on both contracting and clinical issues while maintaining a profitable contracting status with Omnicare. The antipsychotic market is highly competitive. The Oral Dissolving Tablet formulation of Risperdal® must be successful for us to continue the growth of the brand. We must also obtain an advantaged status for Reminyl® to help fuel the brand growth. Since Omnicare is receiving more and more rebate dollars from more and more manufacturers, we must ensure we maintain as favorable and mutually beneficial a relationship as is possible. Only then will we be able to fully realize the potential this customer offers.

* * *

EXHIBIT 18

PAL Template Updated 6/1/00

OMNICARE PHYSICIAN AUTHORIZATION LETTER TEMPLATE

Dear Physician:

By checking the options below and signing this document you will authorize Omnicare pharmacists to modify existing orders and dispense the following alternative medications based on interchange protocols. This process promotes medication management which is therapeutically beneficial or equal and forwards cost effectiveness to the payer whenever possible. It will also reduce the number of individual drug regimen review comments. Conversion protocols will be implemented as noted below.

YES NO

____ ____ ACE INHIBITOR INTERCHANGE

(Interchange to occur at point of dispensing or via consultant based on availability of appropriate diagnosis)

- *Zestril® will be dispensed in lieu of other ACE inhibitors*

  Monitoring will be initiated as follows:

  - *BP q shift x 72 hours then weekly.*
  - *Serum potassium and creatinine/BUN should be checked periodically after initialing or modifying therapy and status will be monitored by consultant pharmacist.*

* *Capoten® (captopril) will not be interchanged when unaccompanied by a diagnosis or with a documented diagnosis of diabetic nephropathy.*

____ ____ ADALAT CC INTERCHANGE

(Interchange to occur via consultant based on medical record review if order is unaccompanied by a diagnosis)

- Adalat CC® will be dispensed in lieu of an equivalent dose of Procardia XL® for a diagnosis of hypertension only.

ATYPICAL ANTIPSYCHOTIC INTERCHANGE

(If Interchange occurs prospectively, antipsychotic Interchange may be done *only* for new orders on existing residents defined as those in the facility for five days or longer. If retrospective, the consultant pharmacist may use their clinical judgment based upon the availability of resident specific data)

____ ____ Risperdal® (risperidone) will be dispensed in lieu of Zyprexa® and Seroquel® for a diagnosis of Dementia (Alzheimer's/OMS) only, with a starting dose of Risperdal® 0.5mg OD.

____ ____ COX-2 INHIBITOR INTERCHANGE

(Interchange to occur at point of dispensing)

Celebrex® (celecoxib) will be dispensed in lieu of an equivalent dose of Vioxx®

___ ___ FLUOROQUINOLONE INTERCHANGE

(Interchange to occur at point of dispensing)

- Lovaquin® (levofloxacin) will be dispensed in lieu of an equivalent dose of other fluoroquinolones. This interchange excludes Noroxin®. Trovan® may only be interchanged after diagnosis verification.

___ ___ HMG CO-A REDUCTASE INHIBITOR INTERCHANGE

(Interchange to occur at point of dispensing)

- Lipitor® will be dispensed in lieu of Pravachol®, Zocor® and Movacor®.
  - All doses (except Zocor® 40mg) will be converted to Lipitor® 10 mg daily.
  - Zocor® 40mg will be converted to Lipitor® 20 mg.

    Note: Mevacor® 10mg will be excluded from the Interchange process due to lack of demonstrated cost savings associated with this conversion.)

___ ___ H2 RECEPTOR ANTAGONIST INTERCHANGE

(Interchange to occur at point of dispensing)

- Omnicare Select H2 Receptor Antagonist of Choice will be dispensed in lieu of other solid and liquid H2 Receptor antagonists. (Note: Cimetidine will not be eligible to be selected as Omnicare's H2 of Choice due to its inferior clinical ranking in Omnicare's Geriatric Pharmaceutical Care Guidelines.)

___ ___ LEVOTHYROXINE INTERCHANGE

(Interchange to occur via consultant based on medical record review)

- Levothyroxine of Choice will be dispensed in lieu of Synthroid® on a mg per mg basis. Following a change from one manufacturer to another, consultants must monitor the need for and/or request appropriate follow-up thyroid monitoring according to the combined clinical judgment of the pharmacist and physician.

___ ___ POTASSIUM CHLORIDE INTERCHANGE

(Interchange to occur at the point of dispensing)

- Sustained Release Potassium Preparation of Choice will be dispensed in lieu of other sustained release potassium preparations on a mEq. per mEq. basis.

___ ___ PROTON PUMP INHIBITOR INTERCHANGE

(Interchange to occur at the point of dispensing)

- Proton Pump Inhibitor of Choice will be dispensed in lieu of an equivalent dose of other PPI's.

PHYSICIAN SIGNATURE _____ DATE _____

* * *

EXHIBIT 19

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

MEMORANDUM

TO: OMNICARE STATES

FROM: OMNICARE TEAM

SUBJECT: COMPLETION OF OMNICARE SETTLEMENT

The Omnicare settlement has now been completed Please find attached to this memorandum:

- A fully executed copy of your state's settlement agreement;
- A copy of your state's Distribution of Proceeds document;
- A check representing your state's recoveries in the case.

Thank you for your cooperation in completing this matter. Please direct any questions to John Guthrie, Ohio Attorney General's Office, 614-466-4638.

SETTLEMENT AGREEMENT

I. Parties

This Settlement Agreement ("Agreement") is entered into between the State of Michigan and Omnicare, Inc ("Omnicare"), acting through their authorized representatives (hereafter referred to as "the Parties").

II. Preamble

As a preamble to this Agreement, the Parties agree to the following:

A. Omnicare is a corporation that owns and operates various entities that are or were participating providers of pharmacy services in the Medicaid Program ("Medicaid") of the State of Michigan, pursuant to Medicaid Provider Agreements entered into with the State of Michigan. Omnicare is currently the largest provider of pharmacy services to long-term care facilities in the United States, operating in 45 states and the District of Columbia.

B. Relator Bernard Lisitza is an individual resident of the State of Illinois. On September 26, 2001, Relator filed a *qui tam* action in the United States District Court for Northern District of Illinois captioned *United States et al. ex rel. Bernard Lisitza., v. Omnicare, Inc* , No. 01 C 7433 (hereinafter "the Civil Action"). During a portion of the relevant time period, Relator worked for an Omnicare-owned facility in Illinois

C. Relator David Kammerer is an individual resident of the state of Ohio. Relator Kammerer has a *qui tam* case pending under seal in the Northern District of Illinois captioned *United States ex rel David Kammerer v Omnicare, Inc.*, No. 04 C 2074. During a portion of the time period, Kammerer was an employee of Omnicare.

D. The State of Michigan contends that Omnicare submitted or caused to be submitted claims for payment to the State of Michigan's Medicaid Program ("Medicaid"), 42 U.S.C. §§ 1396-1396v.

E. The State of Michigan contends that it has certain civil claims, as specified in subparagraphs

i., ii., and iii below, against Omnicare for engaging in the following conduct (hereinafter referred to as the "Covered Conduct"):

i. From April 1, 2000 through December 31, 2005, Omnicare improperly switched its Medicaid patients who were prescribed ranitidine (generic Zantac) 150 mg or 300 mg tablets to the capsule form of the drug. This switch occurred because of Federal Upper Limits ("FULs") that had been placed on the tablet form of Ranitidine by the Centers for Medicare and Medicaid Services ("CMS"). As a result of engaging in this switching behavior, Omnicare received reimbursement amounts from Medicaid that were higher than it was entitled to receive.

ii. From January 1, 2002 through December 31, 2005, Omnicare improperly switched its Medicaid patients who were prescribed fluoxetine (generic Prozac) 10 mg or 20 mg capsules to the tablet form of the drug. As a result of engaging in this switching behavior, Omnicare received reimbursement amounts from Medicaid that were higher than it was entitled to receive.

iii. From April 1, 2001 through December 31, 2005, Omnicare improperly switched its Medicaid patients who were prescribed buspirone (generic Buspar) 15 mg dosage strength to two 7.5 mg dosages. As a result of engaging in this switching behavior, Omnicare received reimbursement amounts from Medicaid that were higher than it was entitled to receive.

F. Omnicare has entered into or will be entering into a separate settlement agreement (hereinafter referred to as the "Federal Settlement Agreement and Release") with The United States Department of

Justice (hereinafter referred to as the "United States") which will be receiving settlement funds from Omnicare pursuant to Paragraph 1(a) below for the Covered Conduct described in Paragraph E above.

G. This Agreement is not an admission of liability by Omnicare, nor is it evidence of any valid claim. Omnicare denies the State of Michigan's contentions. The Parties agree that no provision of this Agreement nor any consideration exchanged pursuant to this Agreement constitutes an admission by Omnicare that it engaged in, or violated any law in connection with, the Covered Conduct described above or otherwise.

H. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

I. This Preamble is an integral part of this Agreement and is binding on the Parties in the same way as the remainder of this Agreement.

III. Terms and Conditions

1. Omnicare agrees to pay to the United States and the states which will be receiving settlement funds pursuant to this paragraph ("the Participating States"), collectively a total of $49.5 million (the "Settlement Amount"). The Settlement Amount is to be paid to the United States and the Participating States, as follows:

a. Omnicare and the United States agree that the sum of $29,641,217.36 represents the Federal Share (the "Federal Settlement Amount"). Omnicare agrees to pay the Federal Settlement Amount to the United States by electronic funds transfer pursuant to written instructions to be provided by the U.S. Attorney's

Office for the Northern District of Illinois. Omnicare agrees to make this electronic funds transfer no later than 10 business days from the Effective Date of the Federal Settlement Agreement and Release.

b. Omnicare and the Participating States agree that the sum of $19,858,782.63 represents the Participating States' share (the "State Settlement Amount") under terms and conditions agreed upon by Omnicare and the Participating States (the "State Settlement Agreements"). Upon execution of the State Settlement Agreements by the Participating States, or at any earlier date as otherwise agreed in writing between Omnicare and the Negotiating Team of the National Association of Medicaid Fraud Control Units, ("NAMFCU"), Omnicare shall transfer the State Settlement Amount to an account designated by NAMFCU for distribution to the Participating States.

c. The total portion of the Settlement Amount paid by Omnicare in settlement for the Covered Conduct to the State of Michigan is $2,780,536.72, consisting of a portion paid to the State of Michigan under this agreement and another portion paid to the federal government as part of the Federal Settlement Agreement and Release. The individual portion of the State Settlement Amount allocable to the State of Michigan under this agreement is the sum of $1,202,944.72.

d. Contingent upon the Participating States receiving the State Settlement Amount from Omnicare and as soon as feasible after receipt, the Participating States agree to pay $1,164,327.83 to Relator Lisitza by electronic funds transfer pursuant to instructions provided by Counsel for the Relator, Michael I. Behn of Behn & Wyetzner, Chartered, ("Counsel for Relator Lisitza"), and to pay $143,226.61

to Relator Kammerer by electronic funds transfer pursuant to instructions provided by Shelley Slade of Vogel & Slade, LLP, ("Counsel for Relator Kammerer").

2. Subject to the exceptions in Paragraph 3 below, in consideration of the obligations of Omnicare in this Agreement, conditioned upon Omnicare's full payment of the Federal and State Settlement Amounts, the State of Michigan on behalf of itself, its officers, agents, agencies, and departments, agrees to release Omnicare, its subsidiaries, divisions, affiliates (including any entity in which Omnicare has at least a 50% ownership interest) as set forth in Attachment A from any civil or administrative monetary claim the State of Michigan has or may have for any claim submitted or caused to be submitted to the State Medicaid Program for the Covered Conduct.

3. Notwithstanding any term of this Agreement, the State of Michigan specifically does not release any person or entity from any of the following claims or liabilities: a. any civil, criminal, or administrative liability arising under State of Michigan revenue codes; b. any criminal liability; c. any civil or administrative liability that Omnicare has or may have under any state statute, regulation, or rule not covered by this release; d. any liability to the State of Michigan (or its agencies) for any conduct other than the Covered Conduct; e. any liability based upon such obligations as are created by this Agreement; f. except as explicitly stated in this agreement, any administrative liability, including mandatory exclusion from the State of Michigan's Medicaid Program; g. except as explicitly stated in this agreement, any liability resulting from disciplinary action relating to licensure; h. any liability for express or implied warranty claims or other claims for defective or deficient

products or services, including quality of goods and services; i. any claims for personal injury or property damage or for other consequential damages arising from the Covered Conduct; j. any liability for failure to deliver goods or services due; k. any liability of individuals, including officers and employees.

4. In consideration of the obligations of Omnicare in this Agreement and the Corporate Integrity Agreement ("CIA") entered into between the Office of the Inspector General of the United States Department of Health and Human Services ("OIG-HHS") and Omnicare, conditioned upon Omnicare's full payment of the Federal and State Settlement Amounts, the State of Michigan agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the State of Michigan's Medicaid Program, except as reserved in Paragraph 3, for the Covered Conduct. Nothing in this Agreement precludes the State of Michigan from taking action against Omnicare in the event that Omnicare is excluded by the federal government, or for conduct and practices other than the Covered Conduct. The State of Michigan does not have the authority to release Omnicare from any claims or actions which may be asserted by private payers or insurers, including those that are paid by a state's Medicaid Program on a capitated basis.

5. Omnicare waives and shall not assert any defenses Omnicare may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy

sought in such criminal prosecution or administrative action. Omnicare is specifically not waiving any other defenses it may have. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the State of Michigan concerning the characterization of the Settlement Amount for purposes of state revenue laws.

6. Omnicare fully and finally releases the State of Michigan, its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Omnicare has asserted, could have asserted, or may assert in the future against the State of Michigan, its agencies, employees, servants, and agents, related to the Covered Conduct and the State of Michigan's investigation and prosecution thereof.

7. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by the State of Michigan's Medicaid Program or other state payer related to the Covered Conduct; and Omnicare shall not resubmit to the State of Michigan's Medicaid Program, or any state payer any previously denied claims related to the Covered Conduct, and shall not appeal any such denials of claims.

8. Omnicare agrees to the following:

a. Unallowable Costs Defined: If applicable, that all costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v; and the regulations and official program directives promulgated there under) incurred by or on behalf of Omnicare, its present or former officers, directors, employees, shareholders,

and agents in connection with the following shall be "unallowable costs" to the State of Michigan's Medicaid Program:

(1) the matters covered by this Agreement;

(2) the State of Michigan's audit(s) and civil and/or criminal investigation(s) of the matters covered by this Agreement;

(3) Omnicare's investigation, defense, and corrective actions undertaken in response to the State of Michigan's audit(s) and civil and/or any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);

(4) the negotiation and performance of this Agreement;

(5) the payment Omnicare makes to the State of Michigan pursuant to this Agreement and any payments that Omnicare may make to Relator, including costs and attorneys fees; and

(6) the negotiation of, and obligations undertaken pursuant to the CIA to:

(i) retain an independent review organization to perform annual reviews as described in Section III of the CIA; and

(ii) prepare and submit reports to the OIG-HHS.

However, nothing in this Paragraph 8 a (6) that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any other authority applicable to Omnicare. (All costs described or set forth in this Paragraph 8 a. are hereafter "unallowable costs.")

b. Future Treatment of Unallowable Costs: If applicable, these unallowable costs shall be separately determined and accounted for by Omnicare, and Omnicare shall not charge such unallowable costs directly or indirectly to the State of Michigan's Medicaid Program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Omnicare or any of its subsidiaries or affiliates to the State of Michigan's Medicaid Program.

c. Treatment of Unallowable Costs Previously Submitted for Payment: If applicable, Omnicare further agrees that within 90 days of the Effective Date of this Agreement it shall identify to the State of Michigan's Medicaid Program any unallowable costs (as defined in this Paragraph) included in payments previously sought from the State of Michigan, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Omnicare or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. Omnicare agrees that the State of Michigan, at a minimum, shall be entitled to recoup from Omnicare any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

If applicable, any payments due after the adjustments have been made, shall be paid to the State of Michigan pursuant to the direction of the affected agencies. The State of Michigan reserves its rights to disagree with any calculations submitted by Omnicare

or any of its subsidiaries or affiliates on the effect of inclusion of unallowable costs (as defined in this Paragraph) on Omnicare or any of its subsidiaries or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the State of Michigan to audit, examine, or re-examine Omnicare's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

9. Omnicare agrees to cooperate fully and truthfully with the State of Michigan's investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Omnicare shall encourage, and agrees not to impair the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals.

10. This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraph 11, below.

11. Omnicare waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payers based upon the claims defined as Covered Conduct.

12. Omnicare warrants that it has reviewed its financial situation and that it currently is solvent

within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States and the Participating States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Omnicare, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity that Omnicare was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

13. In addition to all other payments and responsibilities under this agreement, Omnicare agrees to pay all reasonable travel costs and expenses for the NAMFCU Team. Omnicare will pay this amount by separate check or wire transfer made payable to the National Association of Medicaid Fraud Control Units after the Participating States execute this agreement or as otherwise agreed by the parties.

14. Omnicare represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

15. This Agreement is governed by the laws of the State of Michigan. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

16. The individuals signing this Agreement on behalf of Omnicare represent and warrant that they are authorized by Omnicare to execute this Agreement, both on behalf of Omnicare and on behalf of the various entities that Omnicare owns and/or operates that are or were participating providers of pharmacy services in the Medicaid Program of the State of Michigan, pursuant to Medicaid Provider Agreements entered into with the State of Michigan. The individuals signing this Agreement on behalf of the State of Michigan represent and warrant that they are signing this Agreement in their official capacities and are authorized by the State of Michigan to execute this Agreement.

17. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

18. This Agreement is binding on Omnicare's successors, transferees, heirs, and assigns.

19. All Parties consent to the disclosure of this Agreement, and information about this Agreement, to the public.

20. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE STATE OF MICHIGAN

Dated: 10/18/2006 By: /s/ (Illegible)
State of Michigan
Office of the Attorney General
Medicaid Fraud Control Unit

Dated: 10/13/06 By: /s/ (Illegible)
State of Michigan
Medicaid Program

OMNICARE, INC.

Dated: 11/6/06 By: /s/ (Illegible)
Omnicare Representative

Dated: 11/13/06 By: /s/ Sanford Teplitzky
Sanford Teplitzky
Counsel for Omnicare
Ober Kaler Grimes & Shriver
120 East Baltimore Street
Baltimore, MD 21202-1643
410-347-7364

* * *

EXHIBIT 20

[SEAL]

U.S. Department of Justice
United States Attorney
Northern District of Illinois

Patrick J. Fitzgerald
United States Attorney

Federal Building
219 South Dearborn Street
5th Floor
Chicago, Illinois 60604
(312) 353-5300

FOR IMMEDIATE RELEASE
TUESDAY NOVEMBER 14, 2006
www.usdoj.gov/usao/iln

PRESS CONTACTS

AUSA Linda Wawzenski	(312) 353-1994
AUSA/PIO Randall Samborn	(312) 353-5318

OMNICARE, INC. TO PAY $49.5 MILLION TO UNITED STATES AND 43 STATES TO SETTLE MEDICAID PRESCRIPTION DRUG FRAUD ALLEGATIONS

CHICAGO—The United States and 43 states will receive $49.5 million from Omnicare, Inc., of Covington, Kentucky, to settle Medicaid prescription-drug-fraud claims initiated by two whistleblowers, federal and state officials announced today. Omnicare,

the largest provider of pharmacy services to skilled nursing facilities and assisted living communities in the United States, allegedly substituted different versions of prescribed drugs (such as tablets for capsules) solely to significantly increase the cost and profit rather than for any legitimate medical reason. The settlement covers Omnicare's submission of reimbursement claims to Medicaid programs in 43 states for three prescription drugs from April 2000 through 2005: Ranitidine (generic Zantac), Fluoxetine (generic Prozac) and Buspirone (generic Buspar).

The settlement, which was filed today in U.S. District Court in Chicago, was announced by Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois; Daniel R. Levinson, Inspector General, U.S. Department of Health and Human Services; Michael Cleary, Special Agent-in-Charge of the U.S. Food and Drug Administration, Office of Criminal Investigations, in Chicago; and Robert D. Grant, Special Agent-in-Charge of the Chicago Office of the Federal Bureau of Investigation. Also today, one of the two whistleblower lawsuits that initiated the case was unsealed, and, together, the cases yielded the largest-ever settlement of a federal health care fraud case in the Northern District of Illinois.

The case also marks the first time that a United States Attorney's Office has joined forces with the National Association of Medicaid Fraud Control Units (NAMFCU), to conduct a joint health care fraud investigation. NAMFCU is an organization of 49 state Medicaid Fraud Control Units and provides a forum for sharing information and improving the quality of investigations. In this case, agents from the FBI, the FDA Office of Criminal Investigations, and the Health and Human Services Department's Office of Inspector

General joined forces with state attorneys general and investigators from Illinois, Massachusetts, Ohio, Pennsylvania, North Carolina, and Florida. In addition, each of the 43 states in which Omnicare operated during the relevant time period provided electronic claims data and other information to the investigative team.

"The health care industry should be wary of manipulating federal and state programs in this manner because, under the federal False Claims Act and its state counterparts, those who are caught face the prospect of triple damages plus significant additional penalties and attorneys fees," Mr. Fitzgerald said. "With significant civil deterrents such as these, and the increasing willingness of corporate insiders to report fraud, companies that cheat federal and state governments risk, at a minimum, potentially crippling financial losses."

Inspector General Levinson, of HHS, said: "Investigating Medicaid prescription drug fraud is a top priority for the U. S. Department of Health and Human Services, Office of Inspector General. We will continue to work closely with Medicaid Fraud Control Units around the country to investigate and prosecute those who engage in schemes to illegally profit from and defraud the Medicaid program at the expense of vulnerable beneficiaries."

The officials noted that Omnicare did not admit liability as part of the settlement.

Under the agreement, within 10 business days Omnicare will pay the United States slightly more than $29,641,000 as the federal share of settlement and it will pay a total of approximately $19,858,782 to be apportioned among the participating state Medicaid

programs. Separate settlement agreements establish the amounts owed to each state. The State of Illinois, for example, will receive a net of $2,568,762.

The universal federal settlement covers allegations that, for each of the three drugs, Omnicare improperly switched Medicaid patients from a cheaper version of the drug to a more expensive version solely to increase its reimbursement rate. Medicaid patients were given Ranitidine capsules instead of the cheaper tablets, Fluoxetine tablets instead of the cheaper capsules, and two 7.5-mg. tablets of Buspirone instead of the cheaper, single 15-mg. tablet. Those switches increased prices substantially while adding no medical benefit and violating federal and state regulations. For example, by substituting Ranitidine capsules for the 150-mg. tablets that were prescribed between December 15, 2000 and April 1, 2001, Omnicare was able to charge Illinois Medicaid $79.80 instead of $17.10 per 60 tablet prescription for a difference of $62.70.

Omnicare made some of these switches without specifically informing the prescribing doctor of the change in drug form, sometimes falsely telling the physician that the new version of the drug would be cheaper for the payer, and other times suggesting some undefined patient benefit from the new form of the drug. Nevertheless, according to the allegations, Omnicare's sole reason for each switch was to increase the amount of reimbursement it would receive from Medicaid for each prescription.

While capsules and tablets generally function in the same way when they enter the body, both federal Food and Drug Administration law and state statutes provide that the different dosage forms of the same compound are not considered the same. Therefore,

pharmacists cannot switch customers between capsule and tablet forms of a medication without a direct order from a physician. State and federal regulations permit a pharmacist to switch between medications (such as from a name brand to a similarly formulated, equally effective generic drug) for a Medicaid beneficiary only if two conditions are met: first, that the replacement drug is considered therapeutically and pharmaceutically equivalent, and secondly, that the unit price for the replacement drug is *less* than the unit price for the medication originally prescribed.

Medicaid is a joint federal—state program that provides health care benefits for certain groups, primarily low-income and disabled persons. The federal involvement in Medicaid includes providing matching funds and ensuring that states comply with minimum standards in the administration of the program. The federal share of states' Medicaid payments, known as the Federal Medical Assistance Percentage (FMAP), is based on each individual state's per capita income compared to the national average. Among the states, the FMAP is at least 50 percent, and in some instances, as high as 83 percent. In Illinois, the FMAP or federal share is 50 percent.

As part of the settlement, Omnicare has also entered into a compliance agreement with the Department of Health and Human Services that is designed to prevent this type of drug switch in the future. The compliance agreement will be in effect for five years.

Both individuals, or so-called "relators," who initiated the case by filing their own separate law suits, will receive a share of the settlement from both the United States and the states that have their own whistleblower statutes. One relator, Bernard Lisitza, will receive $6,443,204, and relator David Kammerer

will receive $792,593 as their respective shares of the federal and state settlements.

Mr. Lisitza, a licensed pharmacist who worked as a supervisor at Jacobs HealthCare Systems, an Omnicare facility in Des Plaines, Illinois, is represented by Michael Behn, of Behn & Wyetzner, Chartered, in Chicago. Mr. Kammerer, the former director of Medicaid reimbursement at Omnicare's headquarters in Kentucky, is represented by Charles Atkins, of Weisser & Wolf in Cincinnati, and Shelley Slade, of Vogel & Slade in Washington, D.C.

The United States was represented by assistant United States attorney Linda A. Wawzenski, deputy chief of the U.S. Attorney's Office civil division. Omnicare was represented by Sanford Teplitzky, of Ober, Kaler, Grimes & Shriver in Baltimore, Maryland.

The case is *United States et al., ex rel. Bernard Lisitza v. Omnicare, Inc.*, 01 C 7433, and *United States et al., ex rel. David Kammerer v. Omnicare, Inc.*, 04 C 2074 (N.D. Il.). The Lisitza case was unsealed today, while the Kammerer case remains under seal.

Under the federal False Claims Act, defendants may be liable for triple the amount of actual damages and civil penalties between $5,500 and $11,000 for each violation. Individual whistleblowers may be eligible to receive between 15 and 30 percent of the amount of any recovery.

* * *

EXHIBIT 23

OMNICARE MEMORANDUM

Professional Services

PRO 98-10

DATE: August 25, 1998

TO: Omnicare Consultant Coordinators
Omnicare Formulary Champions

FROM: Mark E. Lehman
Director, Clinical Services

RE: Re-Issue of Risperdal PSTI Protocol

CC: Timothy E. Bien
Regional Vice Presidents
Regional Clinical Directors

As you are aware, Omnicare has made the Risperdal Patient Specific Therapeutic Interchange program a very high priority for the third and fourth quarters of 1998 and beyond. In support of this initiative, please find attached an updated, revised edition of the Risperdal PSTI protocol. In addition to the comprehensive medical review previously circulated, this PSTI protocol also contains important strategies and intervention scenarios for both operations and consultant clinicians, and sample drug regimen review comments for use in your facilities. Please feel free to adapt and change these comments for your use.

Please copy and distribute this important information to all Omnicare pharmacists and nurse consultants dealing with formulary intervention programs. It is imperative that all formulary management intervention programs be implemented as quickly and comprehensively as possible, using both operations and consultant resources.

This intervention, and all Omnicare formulary initiatives will be discussed, in great detail, during the upcoming Professional Services Committee/ Formulary Champions Meeting in Covington, KY on September 9-10, 1998. I look forward to seeing many of you at this important meeting. In the meantime, if you have questions or comments please contact your Regional Clinical Director or myself. As always, thank you for your continued efforts and support.

* * *

CONFIDENTIAL

Risperidone (Risperdal)
Information for Omnicare Pharmacists

Information for Dispensing Pharmacists

Dispensing pharmacists have the unique opportunity to perform clinical interventions prior to dispensing a prescription. The following scripts were developed to facilitate the appropriate intervention prospectively.

Scenario #1

A new prescription for an atypical antipsychotic is received

> We have received a new prescription for [Name of atypical antipsychotic, dosage, and frequency].
>
> As Risperdal is the only atypical that has been studied in the elderly for controlling behaviors and also offers a significant price advantage for the payer when compared to other atypical antipsychotics I would recommend Risperdal [dosage and frequency] in this resident.

Scenario #2

A resident is already taking an antipsychotic drug and a new prescription for Artane or Cogentin or Symmetrel has been added due to abnormal movement side effects from a typical antipsychotic

(Do not initiate this interchange if the resident has Parkinson's Disease—if the diagnosis is unclear, or unavailable, check medication regimen for the presence of Parkinson's medications)

Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and has significantly less side effects compared to conventional antipsychotic agents. This resident is receiving (antipsychotic name /dose) and [ ] appears to have been added to address extrapyramidal side effects. Recommend reassessing the continuation of [name of typical antipsychotic] and/or initiating Risperdal ___ mg ___ times daily

Scenario #3

A resident is receiving a typical antipsychotic drug and a prescription to increase the dosage of Artane or Cogentin or Symmetrel is received.

(Do not initiate this interchange if the resident has Parkinson's Disease—if the diagnosis is unclear, or unavailable, check medication regimen for the presence of Parkinson's medications)

Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and has significantly less side effects compared to conventional antipsychotic agents. This resident is receiving (antipsychotic name/ dose) and the

dose of [ ] has been increased to address extrapyramidal side effects. Recommend reassessing the continuation of [name of typical antipsychotic] and/or initiating Risperdal ___ mg ___ times daily.

Information for Consultant Pharmacists

Consultant Pharmacists are optimally positioned to discuss the clinical benefits of a therapy with physicians and nurses. The following scripts were developed to assist the consultant pharmacist to discuss the appropriate use of Risperdal.

Scenario #1

Initiating Risperdal therapy when an atypical antipsychotic is already being prescribed.

As Risperdal is the only atypical that has been studied in the elderly for controlling behaviors and also offers a significant price advantage for the payer when compared to other atypical antipsychotics I would recommend Risperdal [dosage and frequency] in this resident.

Scenario #2

Initiating Risperdal therapy when a typical antipsychotic is being prescribed.

[Name of resident] is currently receiving [name, dosage, and frequency of the present typical antipsychotic]. As you are aware, [name of drug] is associated with significant side effects, which could include extrapyramidal side effects (EPS), tardive dyskinesia (TD), as well as anticholinergic side effects. [Name of Drug] side effect profile is also associated with an increased incidence of falls and fractures. Due to the potential for these adverse effects, I would recommend changing [name of drug] to Risperdal (dosage and frequency).

Scenario #3

Interchanging Risperdal when resident is receiving a typical antipsychotic and an anticholinergic agent (Cogentin, Artane and Symmetrel) is being prescribed to control extrapyramidal side effects.

> Resident is currently receiving [name, dosage, frequency of the present typical antipsychotic] and [name of anticholinergic] to control EPS symptoms. Due to the presence of this adverse drug reaction, I recommend that this therapy be modified to the use of Risperdal [dosage and frequency].

Drug Regimen Review Comments

Resident is exhibiting inappropriate behavior warranting the use of an antipsychotic and is presently receiving a typical agent.

> This resident is receiving [name, strength, dose drug] for [diagnosis/behavior] and continues to have documentation of this behavior. Recommend discontinuing/tapering [name of drug] and initiating Risperdal ___ mg ___ times per day. Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and has a lesser side effect profile compared to conventional antipsychotics.

Resident is exhibiting inappropriate behavior warranting the use of an antipsychotic and is presently receiving an atypical agent.

> This resident is receiving [name, strength, dose drug] for [diagnosis/behavior]. Recommend discontinuing/tapering [name of drug] and initiating Risperdal ___ mg ___ times per day.

Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and significantly reduces the cost to the payer of the pharmacy bill.

An anticholinergic drug has been added due to side effects from a typical antipsychotic.

[Name of anticholinergic] apparently has been added to address apparent EPS side effects of [name of typical antipsychotic]. Recommend discontinuing/tapering [name of typical antipsychotic and name of anticholinergic] and initiating Risperdal ___ mg ___ times daily. Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and has a lesser side effect profile compared to conventional antipsychotics.

Resident has an anticholinergic dosage increase and is receiving a typical antipsychotic

[Anticholinergic drug] dosage has been increased apparently to address EPS side effects of [name of typical antipsychotic]. Recommend discontinuing/tapering [name of typical antipsychotic and name of anticholinergic] and initiating Risperdal ___ mg ___ times daily. Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and has a lesser side effect profile compared to conventional antipsychotics.

Typical antipsychotic therapy for a resident with Parkinson's Disease

This resident has a diagnosis of Parkinson's Disease and is receiving [name of typical

antipsychotic]. This therapy may exacerbate symptoms and reduce the effectiveness of Parkinson's therapy. Recommend discontinuing/tapering this therapy and initiating Risperdal ___ mg ___ times per day. Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and has a lesser side effect profile compared to conventional antipsychotics.

An atypical (non-Risperdal) antipsychotic is being utilized

This resident is receiving [atypical antipsychotic]. Recommend discontinuing/tapering and initiating Risperdal ___ mg ___ times daily. Risperdal has been studied in the elderly for controlling behaviors associated with geriatric dementia and/or psychotic disorder and costs less than other atypical agents.

A conventional antipsychotic is being utilized and the resident is exhibiting signs of tardive dyskinesia or extrapyramidal symptoms.

This resident is currently receiving [name, dosage, and frequency of the present atypical antipsychotic]. Recommend a change to Risperdal because this resident is experiencing side effects of muscle and facial expressions, lip and peripheral area puckering, and choreic movements according to nurses notes and last AIMS test dated _____. Atypical antipsychotics, such as Risperdal, have less potential for producing extrapyramidal symptoms.

The mnemonic SWITCH can be a good reminder for changing therapy:

S start atypical agent at low dose

W with draw conventional agent slowly using standard tapering

I involve resident by providing drug information, if applicable

T titrate atypical agent as recommended until therapeutic effect reached

C challenge adverse effects, if needed

H halt conventional therapy

* * *

EXHIBIT 26

Omnicare Profile

2Q00

Product	Contr. Sales	Market Share
Risperdal	16,558,294	58.13%
Duragesic	4,597,723	58.42%
Aciphex	147,454	1.65%
Procrit	4,505,905	
Propulsid	154,808	1.12%
Ultram	1,213,133	24.74%
Levaquin Tab	3,480,377	61.35%
Levaquin IV	367,445	58.52%
	31,025,139	

LTC PP Beds (K)

Omnicare	525
Pharmerica	425
NCS	245
NeighborCare	260
APS	110
Vencare	80
SunScript	70
	1,715

Recent developments

1. Consulting and Services Agreement
   a. Risperdal Rebates have been pushing towards Best Price
   b. To avoid Best Price, the Strategic Overlay for Risperdal (2% of sales) had to be eliminated

c. In order to balance this, an agreement was established with Omnicare to purchase data, roughly at the cost of the Strategic Overlay for Risperdal

* * *

5. Omnicare has been pushing for greater discounts (rebates) due to its market size as well as its ability to move share

* * *

EXHIBIT 38

Unknown

From: Russell, Dale [OMP]

Sent: Friday, June 21, 2002 12:07 PM

To: Forsthoefel, Tim [OMP]

Subject: RE: Omnicare Levaquin initiative

Tim,

Incredible: good for us but scary on the power to do this.

Thanks,

—Original Message—

From: Forsthoefel, Tim [OMP]

Sent: Friday, June 21, 2002 12:47 PM

To: Gamgort, James [OMP]; Russell, Dale [OMP]; Kennedy, Sara [OMP]; Grewcock, David [OMP]; Cummins, Bruce [JAN]; Thurmond, Tracey [OMP]

Cc: Butler, Dave [JANUS]; Graham, Roger [OMP]; Farley, Brett [JAN]; Ball, Gary [OMP)

Subject: FW: Omnicare Levaquin initiative

Dale – Sara – David:

19% share gain in 5 months due to Omnicare pharmacist's physician calling.

Bruce/Tracey—have all regions of Omnicare implemented? Any other National Accounts that have "gaps" in similar behavior modeling?

Outstanding! Tim

—Original Message—

From: Schwans, Roxanne [JAN]

Sent Wednesday, June 19, 2002 12:04 AM

To: Farley, Brett [JAN]

Cc: Butler, Dave [JANUS]

Subject: Omnicare Levaquin initiative

Hi Brett,

I wanted to share some great news. In January of this year I worked with Cedar Rapids, IA to do Therapeutic Interchange letters for Levaquin. They implemented them in Jan while they had a share of 70%. Then in March of '02 they started calling the physicians back. They would fill one script of Cipro and then call the doctor and if they would not return the call after 2 days then they would stay on Cipro but the majority of the physicians would call back and let Omnicare know it was ok to switch to Levaquin. So in May of 02 they have a share of 89% while Cipro is down to 11%.

Great news.

Roxie

Roxanne Schwans

J and J Long Term Cara Business Manager

REDACTED

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contents of this e-mail is strictly prohibited. If you have received this e-mail transmission in error, please reply to the sender, so that Janssen Pharmaceutica can arrange for proper delivery, and then please delete the message from your inbox. Thank you.

EXHIBIT 39

* * *

Lessons Learned
Role of LTC Managers: • Consultant Pharmacists – Extension of Sales Force Clinical Focus – Intervention Programs • Focussed Pharma Effort • Partnerships with: Marketing, Sales, Account Management and Professional Services • JJHCS – Contract Management & Administration • Contracting – small element [LOGO] Setting NEW Standards

* * *

EXHIBIT 40

* * *

From: Forsthoefel, Tim [OMP]

Sent: Friday, February 07, 2003 6:00 PM

To: Thurmond, Tracey [OMP]; Ong, Gregory [HCS]; Butler, Dave [JANUS]; Farley, Brett [JAN]

Subject: Omnicare Levaquin Profitability Model

Omnicare Levaquin Analysis on Profitability.

What this tells me is that for a $3MM investment in rebates with Omnicare, I gain $9MM in sales, less costs and investments, returns $4.8MM to OMP.

* * *

EXHIBIT 41

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed March 4, 2009]

Civil Action No. 05-11519-RGS
FILED UNDER SEAL

UNITED STATES OF AMERICA, *et al.*, *ex rel.*
DAVID M. KAMMERER,

Plaintiff,

v.

OMNICARE, INC., AND
IVAX PHARMACEUTICALS, INC.,

Defendant.

COMPLAINT OF THE UNITED STATES

This is an action to recover treble damages, restitution, and civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-33, and the common law for the submission of false claims to federal health care programs as a result of $8 million in kickbacks that defendant IVAX Pharmaceuticals, Inc., a generic drug manufacturer, paid to induce defendant Omnicare, Inc., a large nursing home pharmacy, to purchase and to recommend drugs from IVAX in violation of the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b).

Jurisdiction and Venue

1. This Court has subject matter jurisdiction under 28 U.S.C. § 1345. The Court has supplemental jurisdiction to entertain the common law causes of

action under 28 U.S.C. § 1367(a). The Court may exercise personal jurisdiction over the defendants, and venue is appropriate in this Court, under 31 U.S.C. § 3732(a) because the defendants transact business in this District and because the defendants submitted, caused to be submitted, or conspired to submit false claims in this District.

The Parties

2. Plaintiff United States, acting through the Department of Health and Human Services, administers Grants to States for Medical Assistance Programs pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq*. (Medicaid).

3. Relator David Kammerer is a resident of Ohio.

4. Defendant Omnicare, Inc. ("Omnicare"), is a Delaware corporation with headquarters in Covington, Kentucky. Omnicare is the nation's largest provider of pharmacy services to nursing homes and other long-term care facilities. It provides services to approximately 1.4 million long-term care residents in 47 states, including Massachusetts. Omnicare's principal business is to fill prescriptions and to deliver drugs to patients in long term care facilities. As part of that business, Omnicare employs pharmacists who make recommendations to nursing home physicians about the drugs they should prescribe for their patients. In many cases, these recommendations are a product of business deals that Omnicare has struck with particular drug manufacturers. Thus, when Omnicare enters into a remunerative contract with one drug manufacturer, Omnicare then directs its pharmacists to recommend that physicians prescribe more of that manufacturer's drugs, either by writing new prescriptions or by agreeing that Omnicare can

switch their patients' existing prescriptions to the drugs of the manufacturer with which Omnicare has a contract.

5. Defendant IVAX Pharmaceuticals, Inc. ("IVAX"), a Florida corporation formerly known as Zenith Goldline Pharmaceuticals, Inc., is a generic drug manufacturer. In 2006, IVAX became a subsidiary of another generic drug manufacturer, Teva Pharmaceuticals, Ltd., an Israeli entity.

Legal Background

6. The False Claims Act provides, in pertinent part, that:

> (a) Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or] (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .
>
> * * *
>
> (b) For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information (1) has

> actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729.

7. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461 (notes), and 64 Fed. Reg. 47099, 47103 (1999), the False Claims Act civil penalties were adjusted to $5,500 to $11,000 for violations occurring on or after September 29, 1999.

8. The federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b), arose out of congressional concern that remuneration and gifts given to those who can influence healthcare decisions would result in goods and services being provided that are medically unnecessary, of poor quality, or even harmful to a vulnerable patient population. To protect the integrity of the Medicare and Medicaid programs from these harms, Congress enacted a prohibition against the payment of kickbacks in any form. First enacted in 1972, Congress strengthened the statute in 1977 and 1987 to ensure that kickbacks masquerading as legitimate transactions did not evade its reach. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 242(b) and (c); 42 U.S.C. § 1320a-7b, Medicare-Medicaid Antifraud and Abuse Amendments, Pub. L. No. 95-142; Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93.

9. The anti-kickback statute prohibits any person or entity from offering, making, soliciting, or accepting remuneration, in cash or in kind, directly or indirectly, to induce or reward any person for purchasing, ordering, or recommending or arranging for the purchasing or ordering of federally-funded medical goods or services:

(b) Illegal remunerations

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b). Violation of the statute also can subject the perpetrator to exclusion from participation in federal health care programs and, effective August 6, 1997, civil monetary penalties of $50,000 per violation and three times the amount of remuneration paid. 42 U.S.C. § 1320a-7(b)(7) and 42 U.S.C. § 1320a-7a(a)(7).

Omnicare's Relationship With Medicaid

10. During the period relevant here, from 2000 through 2004, after Omnicare delivered drugs to patients in long term care facilities, it submitted reimbursement claims on behalf of those patients to their insurers, including Medicaid.

11. Medicaid is a joint federal-state program that provides health care benefits for certain groups, primarily the poor and disabled. The federal portion of each state's Medicaid payments, known as the Federal Medical Assistance Percentage ("FMAP"), is based on the state's per capita income compared to the national average. 42 U.S.C. § 1396d(b). Among the states, the

FMAP is at least 50 percent and is as high as 83 percent.

12. The Medicaid programs of all states reimburse for prescription drugs. The vast majority of states award contracts to private companies to evaluate and to process claims for payment on behalf of Medicaid recipients. Typically, after processing the claims, these private companies then generate funding requests to the state Medicaid programs, which in turn obtain federal funds from the United States.

13. Omnicare is a party to provider agreements with each of the state Medicaid programs to which it submits drug reimbursement claims. In Massachusetts, for example, Omnicare has a provider agreement with MassHealth. Massachusetts regulations provide that: "All pharmacies participating in MassHealth must comply with the regulations governing MassHealth, including but not limited to MassHealth regulations set forth in 130 CMR 406.000 and 450.000." The Massachusetts regulation at 130 CMR 450.261 in turn provides: "All members and providers must comply with all federal and state laws and regulations prohibiting fraudulent acts and false reporting, specifically including but not limited to 42 U.S.C. § 1320a-7b [the federal anti-kickback statute]."

The Genesis Of The Kickback Agreement Between IVAX And Omnicare

14. During 1998 and 1999, Omnicare's Director of Purchasing, Dan Maloney, and its Senior Vice President of Purchasing and Professional Services, Tim Bien, realized that the patents on many major branded drugs soon would be expiring, thereby permitting the entry of generic competitors. Maloney and Bien also realized that a generic drug manu-

facturer might not want to incur the expense of introducing a new generic drug without confidence that the drug would have buyers. Because Omnicare itself was a large buyer of drugs, Maloney and Bien understood that a generic drug manufacturer would place value on having a future purchase commitment from Omnicare before launching a new generic drug. Maloney and Bien then set about trying to extract that value for Omnicare's benefit.

15. In early 1999, Maloney had conversations with IVAX's Vice-President, Sales & Marketing, Kim West, about IVAX making a multi-million dollar payment to Omnicare in exchange for a commitment by Omnicare to purchase certain generic drugs that IVAX then was considering whether to introduce. Omnicare, having been induced to purchase drugs from IVAX, then could recommend those drugs to nursing home physicians and pass on the costs of the drugs to the nursing home patients' insurers, including Medicaid.

16. In a letter dated May 24, 1999, as part of Omnicare's effort to make the business opportunity more attractive to IVAX, Maloney told West that Omnicare "currently has several Disease Management Programs and numerous Therapeutic Interchange Programs in place." Through the Disease Management Programs—nationwide programs in which Omnicare screened patients for various medical conditions—Omnicare could encourage physicians to prescribe more of the drugs that IVAX manufactured. Through the Therapeutic Interchange Programs—nationwide programs in which Omnicare sought physicians' approval to alter patients' drug regimens—Omnicare could encourage physicians to switch patients from other manufacturers' drugs to those that IVAX manufactured. In his May 24 letter, Maloney gave examples

of drugs, such as fluoxetine (the generic form of Prozac, an antidepressant drug), whose utilization Omnicare could influence through these programs. Maloney explained that he wanted West to "understand the opportunity [IVAX] has with Omnicare as we expand utilization of these products through our formulary initiatives."

The Negotiations Between Omnicare And IVAX

May-June 1999

17. By the spring of 1999, IVAX and Omnicare had reached agreement on the broad outlines of a deal where, in exchange for Omnicare's commitment to purchase certain generic drugs exclusively from IVAX for a period of years, IVAX would pay Omnicare a large "signing bonus."

18. The proposed deal with IVAX was very different from anything Omnicare had done in the past. Nevertheless, 1999 was a difficult year for Omnicare in terms of earnings, and the prospect of receiving a substantial upfront payment from IVAX that year was very attractive to Omnicare's senior management.

19. In late May 1999, Omnicare began seeking advice on the IVAX deal from a health care attorney at a large national law firm. (This attorney is referred to hereinafter as "Attorney #1".) Attorney #1 was Omnicare's regular outside counsel for transactional matters involving potential health care fraud and abuse issues. Omnicare sought Attorney #1's advice on whether the proposed signing bonus from IVAX could be characterized as a price "discount" that would fall within the anti-kickback statute's discount exception, 42 U.S.C. § 1320a-7b(b)(3), or the regulatory safe harbor for discounts, 42 C.F.R. § 1001.952(h).

20. In a 15-page memorandum dated June 7, 1999, Attorney #1 warned Omnicare that the proposed payment from IVAX would not fall within either the statutory discount exception or the regulatory discount safe harbor. The memorandum began by advising Omnicare that: "In summary, the proposed arrangement [with IVAX] carries a *heightened* risk that a federal or state prosecutor would determine it violates federal or state fraud and abuse statutes, specifically the federal anti-kickback statute." (Emphasis in original.) The memorandum noted that, in 1994, the Office of the Inspector General of the United States Department of Health and Human Services ("HHS-OIG") had issued a Special Fraud Alert warning that a payment from a drug company could violate the anti-kickback statute if it was "offered to . . . suppliers (including pharmacies . . .) in exchange for, or based on, . . . providing specific prescription products." Attorney #1's memorandum then concluded that:

> The primary issue is that the proposed arrangement, on its face, has all the characteristics of a kickback. It involves a lump-sum cash payment (the stated "signing bonus") intended as an incentive to win Omnicare's business.

21. On June 8, 1999, Attorney #1 discussed his memorandum in a conference call with several Omnicare executives and an accountant from Omnicare's outside accounting firm, Pricewaterhouse Coopers ("PWC"). PWC was involved because Omnicare was trying to determine if it could recognize revenue on the proposed IVAX signing bonus payments in 1999, before Omnicare made any drug purchases from IVAX. Omnicare, through its executives, understood from this conversation and other information that

there was a conflict between the company's desire to book revenue early and Attorney #1's legal advice that any payments by IVAX be tied more closely to actual purchases of product.

July 1999

22. After receiving Attorney #1's June 7 memo, Omnicare continued its discussions with IVAX. On July 9, 1999, IVAX's Kim West faxed a new term sheet to Omnicare's Dan Maloney. An internal IVAX draft of this term sheet stated that the proposed contract's purpose was "[t]o induce Omnicare to purchase new [IVAX] products." The term sheet IVAX actually sent to Omnicare stated that the purpose of the proposed contract was "[t]o promote Omnicare usage of new [IVAX] products."

23. The term sheet contained, *inter alia*, the following provisions:

- Omnicare and IVAX would enter into a three-year agreement with a term from January 1, 2000, through December 31, 2002.
- Omnicare would agree to make $50 million in generic drug purchases from IVAX during the contract term.
- Omnicare would commit to purchase six new generic products exclusively from IVAX during the contract term. These drugs were: fluoxetine (Prozac), omeprazole (Prilosec), famotidine (Pepcid), buspirone (Buspar), terazosin (Hytrin), and enalapril (Vasotec).
- IVAX would pay Omnicare $8 million in fixed amounts, including $2.5 million in 1999, $3 million in 2000, and $2.5 million in 2001.

- In the event that Omnicare did not meet the $50 million purchase target, Omnicare would ratably refund the $8 million.
- IVAX also would pay Omnicare a 5% post-purchase rebate based on Omnicare's actual purchases of IVAX drugs during each quarter of the contract term.

24. On July 13, 1999, West faxed Maloney a slightly revised term sheet. Omnicare faxed IVAX's July 13 term sheet to Attorney #1 and again asked for his advice. On July 21, 1999, Attorney #1 faxed a new memo to Omnicare. Much like his prior memo, Attorney #1's July 21 memo on the IVAX term sheet began with strong cautionary language: "In summary, the proposed arrangement [with IVAX] carries a *significant* risk that a federal or state prosecutor would determine it violates federal or state fraud and abuse statutes, specifically the federal anti-kickback statute." (Emphasis in original.)

25. The July 21 memo observed that the arrangement provided for payments by IVAX to Omnicare a year or more in advance of any corresponding purchases by Omnicare. Accordingly, Attorney #1 warned that, "Because money has a time-value, the Office of Inspector General might interpret this payment as a loan [*i.e.*, not a discount] or simply question the nexus between the payment and the sale." To ameliorate this concern, Attorney #1 proposed specific contract language pursuant to which, *inter alia*, (1) Omnicare would not have an obligation to purchase any products exclusively from IVAX, and (2) IVAX would make its $8 million in payments quarterly over the full three-year term of the contract, beginning with a payment of $833,000 at the end of the fourth quarter of 1999.

August-September 1999

26. On August 24, 1999, IVAX sent Omnicare a draft contract. The IVAX draft was consistent with IVAX's July term sheets. Among other things, the draft contract provided that IVAX would make $2.5 million in payments to Omnicare in 1999, beginning in August, even though Omnicare would not be making any purchases under the agreement until at least January 1, 2000.

27. On August 31 and September 9, 1999, Attorney #1 spoke to IVAX's Associate General Counsel concerning the fraud and abuse issues raised by the proposed contract between Omnicare and IVAX.

28. On September 13, 1999, Attorney #1 sent Omnicare a new memo with revised contract language that he was proposing. Attorney #1 explained that he was "attempting to provide Omnicare with guidance on how it might come closer to achieving its discount objectives with [IVAX] within parameters that present a low risk of implicating the federal anti-kickback statute." If Omnicare and IVAX had adhered to Attorney #1's advice, IVAX could not pay, and Omnicare could not receive or recognize as revenue, $2.5 million in 1999, since the parties did not contemplate that Omnicare would buy any drugs from IVAX in 1999. Attorney #1 explained:

> [W]e do not believe Omnicare, nor [IVAX], based upon recent discussions with its Associate General Counsel, would want to be in the position of defending a $2.5 million cash payment as a prepaid rebate which did not cover a rebate period, and the rebate period (for which purchases were required), did not begin until several months after the cash payment was received. As we

explained in an earlier memorandum, we believe the OIG could challenge this advance cash payment, for which there is no safe harbor, as a "signing bonus," and/or an interest free loan.

29. Neither Omnicare nor IVAX consulted further with Attorney #1 on their proposed contract.

The Finalization Of The Parties' Kickback Arrangement

30. Notwithstanding Attorney #1's repeated warnings, Omnicare still sought the $2.5 million that IVAX was offering to pay it in 1999, and IVAX still sought a purchase commitment from Omnicare.

31. On October 25, 1999, Omnicare's Tim Bien sent a handwritten note to several Omnicare senior executives, including the company's Chief Executive Officer, Joel Gemunder. The note concerned the status of several types of revenue Bien was hoping that Omnicare could recognize in 1999. With respect to IVAX, Bien wrote:

> If we get the . . . ruling in our favor it will mean an additional $2,500[,000] in rebates in 1999. Negotiated —held up by legal.

32. Having received advice from Attorney #1 that did not suit its financial goals, Omnicare sought a second legal opinion from another attorney (referred to hereinafter as "Attorney #2") whom Omnicare had not previously consulted on fraud and abuse issues. Omnicare did not tell Attorney #2 that another attorney already had considered the IVAX deal and had advised Omnicare not to proceed with it. Moreover, in seeking the second opinion, Omnicare falsely represented to Attorney #2 that Omnicare and IVAX intended the $8 million in upfront payments to function solely as a discount on the purchase of $50

million of products. Omnicare did not disclose to Attorney #2 that the parties' main purpose from the outset of the negotiations was for IVAX to pay Omnicare a large "signing bonus." Omnicare also did not disclose to Attorney #2 that it sought the upfront money from IVAX so that it could recognize revenue on the IVAX contract in 1999.

33. Ultimately, Attorney #2 provided Omnicare with an opinion that "it is more likely than not that the $8 million [from IVAX) will be viewed as a discount on the purchase of $50 million of products." At no point, however, either before or after receiving this second opinion, did Omnicare tell Attorney #2 about the legal and factual issues that had led Attorney #1 to conclude that the proposed deal with IVAX was unlawful. Omnicare thus had reason to know that it could not reasonably rely on Attorney #2's opinion because the attorney had not addressed fundamental issues concerning the proposed deal and was misinformed about its true purpose.

34. In November and December, Omnicare and IVAX made minor revisions to their proposed contract. At Omnicare's request, the parties backdated the contract's effective date to April 1, 1999, so that the entire contract would have a 45-month term. Omnicare did this for purposes of revenue recognition. Omnicare intended to prorate the $8 million in payments from IVAX over the period from April 1, 1999, through December 31, 2002, in its financial statements. Omnicare believed that the back-dating of the contract would legitimize its recognition of approximately $1.6 million in revenue in 1999, even though Omnicare still would not begin purchasing drugs from IVAX until 2000.

35. Omnicare and IVAX signed their contract on December 21, 1999. In the contract, Omnicare agreed, *inter alia*, that, during the period from January 1, 2000, through December 31, 2002, Omnicare would purchase six generic drugs exclusively from IVAX and would purchase at least $50 million in drugs altogether from IVAX. In exchange, IVAX agreed, *inter alia*, that it would make a total of $8 million in quarterly payments to Omnicare through the end of 2001, with the first payment of $2.5 million due on or before December 31, 1999, even though Omnicare would not purchase any drugs from IVAX in 1999.

36. On December 21, 1999, the day the parties signed their contract, IVAX issued a $2.5 million check to Omnicare. Over the course of 2000 and 2001, IVAX made an additional $5.5 million in payments to Omnicare. IVAX described the purpose of the payments internally as "purchase commitment" and "volume incentive."

37. In its own internal accounts, IVAX did not allocate its $8 million in payments to reduce the effective prices of the drugs it sold to Omnicare, but rather treated the payments as a reduction in overall profit. Thus, with respect to the payments, IVAX instructed its financial analyst: "Do not factor into price or revenue, take off total profit line." IVAX later described the payments internally as "upfront money" and "non-product specific."

38. By the end of 2000, Omnicare had purchased only $5.5 million in drugs from IVAX under the contract. In June 2001, the parties agreed that they would extend the deadline by which Omnicare would be required to purchase at least $50 million in drugs from IVAX from December 31, 2002, to December 31, 2003.

39. By the end of 2003, Omnicare had purchased only $44 million in drugs from IVAX under the contract. On February 5, 2004, after the first extended contract term had expired, the parties signed an amendment retroactively extending the contract through June 30, 2004.

40. By June 30, 2004, Omnicare had purchased over $50 million in drugs from IVAX under the contract. Omnicare delivered those drugs to patients in long term care facilities. When those patients had drug insurance coverage from Medicaid, Omnicare submitted reimbursement claims to Medicaid for the IVAX drugs that it delivered to those patients.

False Claims

41. All of the thousands of claims that Omnicare submitted, or caused to be submitted, to Medicaid for drugs purchased from IVAX during the period from January 1, 2000, through June 30, 2004, were false or fraudulent due to the illegal kickbacks that IVAX paid to induce Omnicare to make those purchases for patients insured by Medicaid. Examples of such false or fraudulent claims include the following claims submitted to MassHealth:

Patient	Drug	Date Submitted	Amount Paid
A	Fluoxetine	June 2, 2004	$8.12
B	Famotidine	May 16, 2003	$8.18
C	Enalapril	April 19, 2004	$13.27
D	Buspirone	January 28, 2004	$31.48

Count One

(False Claims Act: Presentation Of False Claims, 31 U.S.C. § 3729(a)(1); Against Omnicare, Inc.)

42. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

43. As a result of Omnicare's solicitation and receipt of IVAX's $8 million in kickback payments to induce Omnicare to purchase, order, or recommend or arrange for the purchasing or ordering of drugs manufactured by IVAX, in violation of the anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(1), all of the claims to Medicaid for those drugs were false or fraudulent. Accordingly, Omnicare knowingly presented, or caused to be presented, false or fraudulent claims to officials of the United States in violation of 31 U.S.C. § 3729(a)(1).

44. By virtue of the false or fraudulent claims Omnicare presented or caused to be presented, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false claim.

Count Two

(False Claims Act: Presentation Of False Claims, 31 U.S.C. § 3729(a)(1); Against IVAX Pharmaceuticals, Inc.)

45. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

46. As a result of IVAX offering and making $8 million in kickback payments to Omnicare to induce Omnicare to purchase, order, or recommend or arrange for the purchasing or ordering of drugs

manufactured by IVAX, in violation of the anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2), all of the claims to Medicaid for those drugs were false or fraudulent. Accordingly, IVAX knowingly caused the presentation of false or fraudulent claims to officials of the United States in violation of 31 U.S.C. § 3729(a)(1).

47. By virtue of the false or fraudulent claims IVAX knowingly caused to be presented, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false claim.

Count Three

(False Claims Act: Making Or Using False Records Or Statements To Cause Claims To Be Paid, 31 U.S.C. § 3729(a)(2); Against All Defendants)

48. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

4. Omnicare and IVAX knowingly made, used, or caused to be made or used, false records or statements to cause false or fraudulent claims to be paid or approved by the United States. The false records or statements were the false certifications and representations of full compliance with all federal and state laws and regulations prohibiting fraudulent acts and false reporting, including but not limited to the anti-kickback statute, 42 U.S.C. § 1320a-7b, that Omnicare made or caused to be made in agreements with state Medicaid programs when seeking to ensure that Medicaid would reimburse for the drugs that Omnicare purchased from IVAX.

49. By virtue of the false records or statements Omnicare and IVAX made, used, or caused to be made

or used, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false claim.

Count Four

(False Claims Act: Conspiracy To Submit False Claims, 31 U.S.C. § 3729(a)(3); Against All Defendants)

50. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

51. Omnicare and IVAX conspired with each other to arrange for IVAX to make $8 million in kickback payments to Omnicare to induce Omnicare to purchase, order, or recommend or arrange for the purchasing or ordering of drugs manufactured by IVAX, in violation of the anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(2), thereby causing all of Omnicare's claims to Medicaid for those drugs to be false or fraudulent. According, each of the defendants conspired to defraud the United States by getting false or fraudulent claims allowed or paid.

52. By virtue of the false or fraudulent claims defendants conspired to get allowed or paid, the United States has suffered actual damages and is entitled to recover treble damages plus a civil monetary penalty for each false claim.

Count Five

(Unjust Enrichment And Disgorgement; Against Omnicare, Inc.)

53. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

54. This is a claim for the recovery of monies by which Omnicare has been unjustly enriched.

55. By directly or indirectly obtaining government funds to which it was not entitled, Omnicare was unjustly enriched, and is liable to account for and to disgorge such amounts, or the proceeds therefrom, which are to be determined at trial, to the United States.

Count Six

(Payment By Mistake; Against Omnicare, Inc.)

56. Plaintiff United States repeats and realleges each allegation in each of the preceding paragraphs as if fully set forth herein.

57. This is a claim for the recovery of monies paid by the United States to Omnicare as a result of mistaken understandings of fact.

58. The false claims that Omnicare presented to the United States were based upon mistaken or erroneous understandings of material fact.

59. The United States, acting in reasonable reliance on the accuracy and truthfulness of the information contained in the claims, paid Omnicare, directly or indirectly, certain sums of money to which Omnicare was not entitled, and Omnicare is thus liable to account for and to pay such amounts to the United States.

Prayer For Relief

WHEREFORE, the United States demands and prays that judgment be entered in favor of the United States as follows:

1. On Count One under the False Claims Act, against Omnicare, for the amount of the United

States' damages, trebled as required by law, and such civil penalties as are required by law, together with such further relief as may be just and proper.

2. On Count Two under the False Claims Act, against IVAX for the amount of the United States' damages, trebled as required by law, and such civil penalties as are required by law, together with such further relief as may be just and proper.

3. On Counts Three and Four under the False Claims Act, against all defendants, for the amount of the United States' damages, trebled as required by law, and such civil penalties as are required by law, together with such further relief as may be just and proper.

4. On Counts Five and Six, against Omnicare for unjust enrichment and payment by mistake, for the damages sustained and/or amounts by which Omnicare was unjustly enriched or by which Omnicare retained illegally obtained monies, plus interest, costs, and expenses, and such further relief as may be just and proper.

Demand for Jury Trial

The United States demands a jury trial in this case.

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

MICHAEL J. SULLIVAN
United States Attorney

Dated: March 4, 2009

By: /s/ Gregg Shapiro

GREGG SHAPIRO
CHRISTINE WICHERS
Assistant United States Attorneys
One Courthouse Way
Suite 9200
Boston, MA 02210
(617) 748-3100

JOYCE R. BRANDA
DANIEL R. ANDERSON
LAURIE A. OBEREMBT
Attorneys, Civil Division
UNITED STATES DEPARTMENT OF JUSTICE
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN - 5 2014
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No. 13-435

In the Supreme Court of the United States

OMNICARE, INC., ET AL., PETITIONERS

v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

HARVEY KURZWEIL
RICHARD W. REINTHALER
JOHN E. SCHREIBER
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166

ANDREW C. NICHOLS
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
Counsel of Record
JOSEPH M. TERRY
JOHN S. WILLIAMS
A. JOSHUA PODOLL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, provides a private remedy for a purchaser of securities issued under a registration statement filed with the Securities and Exchange Commission if the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." The question presented is as follows:

For purposes of a Section 11 claim, whether a plaintiff may plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, or whether the plaintiff must also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Omnicare, Inc. (Omnicare); Joel F. Gemunder; David W. Froesel, Jr.; Cheryl D. Hodges; Sandra E. Laney; and the Estate of Edward L. Hutton. Omnicare has no parent corporation, and no publicly held company owns 10% or more of Omnicare's stock.

Respondents are Laborers District Council Construction Industry Pension Fund and Cement Masons Local 526 Combined Funds.

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In the Supreme Court of the United States

No. 13-435

OMNICARE, INC., ET AL., PETITIONERS

v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 35-59) is reported at 719 F.3d 498. The opinion and order of the district court granting petitioners' motion to dismiss (Pet. App. 28a-41a) is unreported. An earlier opinion of the court of appeals (Pet. App. 42a-67a) is reported at 583 F.3d 935.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2013. A petition for rehearing was denied on July 23, 2013 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 4, 2013, and was granted on March 3, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, is reprinted in an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

Section 11 of the Securities Act of 1933 imposes civil liability when a registration statement for a securities offering "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). This case presents the question whether a statement of opinion or belief constitutes an "untrue statement of a material fact" when the stated belief, although actually held, turns out to have been mistaken. The statutory text and basic logic dictate the answer to that question: a statement of opinion or belief is an "untrue statement of a material fact" only if it misstates the "fact" that the speaker actually held the stated belief.

The question presented here is not a new one. This Court answered it more than two decades ago in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991). In that case, brought under Section 14(a) of the Securities Exchange Act of 1934, the Court held that a statement of opinion or belief is an untrue statement of material fact only insofar as it misstates "the psychological fact of the speaker's belief in what he says." *Id.* at 1095. For a claim based on such a statement, then, the Court required a showing that the speaker "did not believe" what he was saying. *Ibid.* (citation omitted).

Here, respondents asserted a claim against petitioners under Section 11 based on statements of opinion in a registration statement. But they did not allege, and in fact disclaimed any allegation, that the issuer did not

hold the stated belief. The district court granted petitioners' motion to dismiss, Pet. App. 28a-41a, but the Sixth Circuit reversed in relevant part, J.A. 35-59. Departing from all of the other courts of appeals to have considered the question, the Sixth Circuit concluded that the reasoning of *Virginia Bankshares* does not apply in an action brought under Section 11. J.A. 47-51. That conclusion was incorrect as a matter of text and logic, and the judgment below should therefore be reversed.

1. a. Petitioner Omnicare, Inc. (Omnicare), is the largest provider of pharmacy-related services for the elderly and other residents of long-term care facilities in the United States. The remaining petitioners were officers or directors of Omnicare at the relevant time. J.A. 37.

In December 2005, Omnicare offered 12.8 million shares of common stock for sale. In connection with that offering, Omnicare filed a registration statement with the Securities and Exchange Commission (SEC). See 15 U.S.C. 77e. The registration statement consisted of a prospectus and a prospectus supplement, each of which incorporated other documents already on file with the SEC. The registration statement was signed by Omnicare and the other petitioners. J.A. 187-188.

b. As Omnicare has stated in its public filings, "[i]nstitutional pharmacies, as well as the long-term care facilities they serve, are subject to extensive federal, state and local regulation." J.A. 88. As it comes to the Court, this case concerns statements regarding Omnicare's compliance with certain legal and regulatory requirements.

In its registration statement, Omnicare informed the market of a list of "[r]isks, uncertainties, [and] contingencies" that could "cause actual results, performance or achievements to differ materially from those stated."

J.A. 149. Among those risks were "new legislation, government regulations * * * and changes in the interpretation and application of such policies; * * * the outcome of litigation; * * * [and] the outcome of audit, compliance, and administrative or investigatory reviews." J.A. 150-151. In sections entitled "Risk Factors," Omnicare stated that "[f]ederal and state healthcare legislation has significantly impacted our business, and future legislation and regulations are likely to affect us." J.A. 156. And Omnicare's 2004 Form 10-K, which the registration statement incorporated by reference, dedicated nearly half of its section about Omnicare's business to explaining "[g]overnment regulation." J.A. 88-107.

In discussing those risks, Omnicare also expressed its belief that its practices complied with the law. In its 2004 Form 10-K, for example, Omnicare stated as follows:

> We have to comply with federal and state laws which govern financial and other arrangements between healthcare providers. These laws include the federal anti-kickback statute[.] * * * We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws. These laws may, however, be interpreted in the future in a manner inconsistent with our interpretation and application.

J.A. 94-96; see J.A. 89, 104-105. The registration statement itself contained similar statements. See J.A. 137 (stating that "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve"); J.A. 164 (stating

that "[w]e believe that we are in compliance in all material respects with state and federal regulations applicable to our business").

2. Respondents, plaintiffs in this lawsuit, are two pension funds that purchased approximately 2,000 shares of Omnicare stock in the December 2005 offering. J.A. 187. After the offering, they bought additional shares in the open market. Both respondents sold all of their shares on January 30 and 31, 2006. J.A. 37.

On February 2, 2006, this lawsuit was filed against petitioners Omnicare, Gemunder, and Froesel in the United States District Court for the Eastern District of Kentucky on behalf of a putative class of investors in Omnicare stock. The initial complaint alleged that defendants had violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder by, *inter alia*, making public statements falsely representing that Omnicare was in compliance with the Medicare laws. The complaint was later amended to add another individual defendant and to allege that defendants had also violated Section 10(b) by falsely representing that Omnicare's financial statements complied with Generally Accepted Accounting Principles (GAAP). The complaint was then amended again to add more individual defendants and to add a claim under Section 11, based solely on the alleged misstatements concerning GAAP.[1]

Petitioners moved to dismiss the complaint for failure to state a claim. The district court granted the motion. 527 F. Supp. 2d 698 (E.D. Ky. 2007). With regard to the legal-compliance statements, the court held that re-

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[1] One of the individual defendants, Edward L. Hutton, died during the pendency of the lawsuit. See D. Ct. Dkt. 113, at 1 n.1 (Nov. 10, 2010).

spondents' Section 10(b) claim failed because Omnicare had no duty to disclose "soft" information about the company's belief in the legality of its own actions, *id.* at 709-710, and because respondents had failed to "plead facts which support an inference that defendants knew [the statements] to be false at the time they were made," *id.* at 710-711. The court dismissed the remainder of respondents' claims, including the Section 11 claim, for failure to plead facts demonstrating loss causation. *Id.* at 704-709 & n.8.[2]

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 42a-67a. It agreed with the district court that respondents' Section 10(b) claim failed insofar as it rested on Omnicare's statements concerning legal compliance, because the complaint did not "specifically * * * allege that [petitioners] knew their statements of 'legal compliance' were false when made." *Id.* at 62a. The court of appeals also affirmed the dismissal of the remainder of respondents' Section 10(b) claim. *Id.* at 55a-60a.

As to the Section 11 claim, however, the court of appeals reversed. Pet. App. 66a-67a. The court reasoned that, although loss causation is an element of a Section 10(b) claim, it is only an affirmative defense to a Section 11 claim. *Id.* at 66a. Petitioners urged the court to affirm the dismissal of the Section 11 claim on the alternative ground that respondents had failed to plead that claim with particularity under Federal Rule of Civil Procedure 9(b). See *ibid.* The court of appeals agreed with

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[2] Because respondents did not otherwise state a valid claim, the district court also dismissed a claim against the individual defendants for control-person liability under Section 20(a). See 527 F. Supp. 2d at 711.

a number of other circuits that Section 11 claims that "sound in fraud" must meet the pleading requirements of Rule 9(b), *ibid.*, but it remanded the case for the district court to apply those requirements in the first instance, *id.* at 67a.

4. Respondents filed a petition for certiorari, challenging the court of appeals' holding that Rule 9(b) applies to Section 11 claims sounding in fraud. The Court called for the views of the Acting Solicitor General. Shortly thereafter, respondents withdrew their petition. 133 S. Ct. 21 (2010).

5. On remand in the district court, respondents again amended their complaint. The operative version of the complaint asserts only a Section 11 claim. In addition to alleging that Omnicare had substantially overstated its revenue in violation of GAAP, respondents added a new theory: namely, that, in the course of describing the risks of the legal and regulatory environment in which it operated, Omnicare had made misstatements when it expressed its belief that various business practices were in legal compliance. See, *e.g.*, J.A. 38, 42. Notably, in an apparent effort to avoid the application of Rule 9(b)'s heightened pleading standard, respondents "expressly exclude[d] and disclaim[ed] any allegation that could be construed as alleging fraud or intentional or reckless misconduct." J.A. 273.

Unlike the legal-compliance statements on which respondents had relied in their earlier Section 10(b) claim, the statements that formed the basis of respondents' Section 11 claim came from the December 2005 registration statement and the documents incorporated by reference therein. Respondents focused on the discussions in those documents of Omnicare's business, risks, and legal and regulatory environment. For example, respondents sought to impose Section 11 liability for the following

statement, as quoted above, from Omnicare's 2004 Form 10-K:

> *We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.* These laws may, however, be interpreted in the future in a manner inconsistent with our interpretation and application.

J.A. 203 (emphasis in complaint); see J.A. 185-186, 191-192, 202, 226-227.

Respondents claimed that this statement of belief and others like it were false or misleading, not because Omnicare did not believe that it was in legal compliance, but rather because Omnicare had engaged in practices that, in respondents' view, were illegal. See J.A. 185-186, 191, 203-204, 227. In support of that proposition, respondents heavily relied on unproven allegations taken from complaints in several *qui tam* actions that had been filed against, and were later settled by, Omnicare. See J.A. 191, 231, 243-248. None of those actions had resulted in any finding or admission that Omnicare had engaged in illegal practices, nor has there been any such finding or admission since.

Petitioners again moved to dismiss the complaint for failure to state a claim, and the district court granted the motion. Pet. App. 28a-41a. With regard to the statements concerning legal compliance, the district court held that respondents had failed to plead a Section 11 claim because they had not sufficiently pleaded facts demonstrating that "[Omnicare's] officers knew they were violating the law": *i.e.*, that Omnicare did not believe that it was in legal compliance. *Id.* at 39a. With regard to the statements about GAAP, the district court held that respondents had failed to plead their claim with

particularity under Rule 9(b) (and that respondents' disclaimer was insufficient to avoid Rule 9(b)'s pleading requirements). *Id.* at 34a-37a & n.3.

6. The court of appeals affirmed in part, reversed in part, and remanded. J.A. 35-59. With regard to the statements about GAAP, the court of appeals agreed with the district court that respondents had failed sufficiently to plead their claim. J.A. 53-55.

As is relevant here, however, the court of appeals reversed the dismissal of respondents' Section 11 claim insofar as it rested on Omnicare's statements concerning legal compliance. J.A. 42-53. It rejected the district court's holding that "[respondents] were required to plead that [petitioners] knew that the statements of legal compliance were false at the time they were made." J.A. 43. In so doing, the court of appeals acknowledged that, in its earlier opinion, it had required respondents to plead such knowledge in order to assert a Section 10(b) claim based on the statements about legal compliance. J.A. 45-46.

But the court of appeals refused to apply the same reasoning to a claim under Section 11, on the ground that Section 11 imposes strict liability. J.A. 47. The court thus assumed that a statement of opinion or belief could be an untrue statement of material fact simply because the belief turned out to be objectively erroneous, even if the statement accurately conveyed the speaker's belief at the time. *Ibid.* "[O]nce a false statement has been made," the court asserted, "a defendant's knowledge is not relevant to a strict liability claim," and "a complaint may survive a motion to dismiss without pleading knowledge of falsity." *Ibid.*

The court of appeals acknowledged that it was creating a conflict with *Fait* v. *Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), and *Rubke* v. *Capitol Bancorp*

Ltd., 551 F.3d 1156 (9th Cir. 2009), which held that liability for a statement of opinion or belief under Section 11 lies "only to the extent that the statement was both objectively false *and disbelieved by the defendant* at the time it was expressed." J.A. 47-48 (emphasis added) (quoting *Fait*, 655 F.3d at 110). The court of appeals noted that those decisions had relied on this Court's decision in *Virginia Bankshares*, which held, in the context of a Section 14(a) claim based on a statement of opinion, that a plaintiff was required to allege both "objective falsity" and "a defendant's disbelief in his own statement." J.A. 48-49.

According to the court of appeals, however, this Court in *Virginia Bankshares* had "assumed the jury in the case had already found knowledge of falsity" and had "tied the knowledge of falsity requirement to scienter." J.A. 49. As a result, the court of appeals contended, "[t]he *Virginia Bankshares* discussion * * * has very limited application to § 11." J.A. 50. Based on that narrow reading of *Virginia Bankshares*, the court of appeals asserted that "[t]he Second and Ninth Circuits have read more into *Virginia Bankshares* than the language of the opinion allows and have stretched to extend this § 14(a) case into a § 11 context." J.A. 49. The court of appeals added that "[t]his is a context in which extension of dicta is most dangerous," and concluded that, "[i]n writing the opinion, the Court could not have intended that musings regarding the [subjective-falsity] requirement would later be applied to an unrelated statute." J.A. 51.

Having held that it was unnecessary for respondents to plead that Omnicare did not *believe* that it was in legal compliance, the court of appeals determined that respondents had sufficiently pleaded the falsity of the statements simply by alleging, based primarily on allega-

tions taken from *qui tam* complaints, that Omnicare was not *in fact* in legal compliance. J.A. 51-53.

7. The court of appeals subsequently denied rehearing. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

A. Like many other provisions of the federal securities laws that expressly or impliedly impose civil liability, Section 11 of the Securities Act prohibits the making of untrue or misleading statements of material fact. This case presents the question whether a statement as to a speaker's opinion or belief can be an untrue statement of material fact when the speaker actually held the stated belief. As a matter of text, logic, and precedent, the answer to that question is no.

The word "fact" conveys an element of certainty. Opinions and beliefs, by contrast, are inherently subjective assessments. The only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. It naturally follows that such a statement can be "untrue" as to a "material fact" only if the speaker did not actually hold the stated belief.

B. The Court's decision more than two decades ago in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), confirms that common-sense proposition. There, the Court addressed the question whether a statement of opinion or belief could *ever* be "actionable as [a] misstatement[] of material fact." *Id.* at 1090. The Court held that it could be, but only if it constitutes "a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095. To establish that such a statement was false or misleading, therefore, the plaintiff must show that the speaker "did not believe" what he was saying. *Ibid.* (citation omitted).

The Court's holding in *Virginia Bankshares* flowed from the text of the substantive provision of federal securities law at issue, Rule 14a-9—which, like Section 11, confines liability to false or misleading statements of material fact. The Court's holding is also consistent with the common law of misrepresentation, under which statements of opinion or belief are actionable only insofar as they misstate the speaker's actual belief.

C. The Sixth Circuit erred in refusing to follow *Virginia Bankshares* in construing materially identical language in Section 11. It concluded that, simply because Section 11 is a strict-liability statute, a court assessing a claim under Section 11 may not take into account the defendant's subjective belief. Under the Sixth Circuit's view, a plaintiff may state a claim under Section 11 based on a statement of opinion or belief merely by alleging (with the benefit of hindsight) that the stated opinion turned out to be wrong.

The Sixth Circuit's approach flouts the presumption of consistency, which calls for the same language to be given the same meaning wherever it appears in a similar statutory provision. Neither the absence of a scienter requirement nor any other feature of Section 11 requires departing from the reasoning of *Virginia Bankshares* in this case. The Court's explanation in *Virginia Bankshares* of what it means for a statement of opinion to be actionable had nothing to do with scienter; the Court expressly declined to decide whether scienter is even required in an action under Section 14(a). And construing the "untrue statement of a material fact" element of Section 11 consistently with *Virginia Bankshares* does not conflict in any respect with the strict nature of Section 11 liability.

D. The decision below would create serious practical problems. For a start, it would expose issuers and other

Section 11 defendants to strict liability for inherently subjective judgments that later events show were mistaken. That liability-by-hindsight approach would turn Section 11 into a vehicle for after-the-fact second-guessing by plaintiffs and their lawyers. Such an approach would contravene this Court's instruction to construe strict-liability statutes such as Section 11 in a way that provides "predictive value," *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988), so that issuers can predict at the time whether their statements may subject them to liability. Legal-compliance statements, which by definition depend on the speaker's judgment as to unknowable future events, would be especially vulnerable to challenge. A rule that permitted liability based solely on objective falsity would chill the voluntary disclosure of information by issuers regarding their legal and regulatory environments—information that may be useful to investors. And it would discourage issuers from settling related cases, like the *qui tam* actions whose unproven allegations formed the basis for the claim here.

E. Should this Court agree with petitioners that a statement of opinion or belief is actionable under Section 11 only if the speaker did not hold the stated belief, it should reverse the court of appeals' judgment and thereby reinstate the district court's dismissal of respondents' Section 11 claim. In the operative version of the complaint, respondents expressly disclaimed any allegation of subjective disbelief. That disclaimer compels dismissal in the event the Court concludes, as it should, that the court of appeals' interpretation of Section 11 was erroneous.

ARGUMENT

A STATEMENT OF OPINION OR BELIEF IS ACTIONABLE AS AN 'UNTRUE STATEMENT OF A MATERIAL FACT' UNDER SECTION 11 ONLY WHEN THE SPEAKER DID NOT HOLD THE STATED BELIEF

Section 11 of the Securities Act of 1933 imposes civil liability when a registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). The question presented by this case is whether, and under what circumstances, a statement of opinion or belief can be an "untrue statement of a material fact" under Section 11.

The only *fact* conveyed by a statement of opinion or belief, which reflects an inherently uncertain assessment, is the fact that the speaker held the stated belief. As a matter of logic, that fact is untrue only if the speaker did not hold the stated belief. In *Virginia Bankshares*, this Court construed materially identical language in an action brought under Section 14(a) of the Securities Exchange Act of 1934 in precisely that manner. The Sixth Circuit erred by refusing to follow the reasoning of *Virginia Bankshares* in an action brought under Section 11.

A. Like Other Provisions Of The Federal Securities Laws, Section 11 Imposes Liability Only For Untrue Statements Of Material Fact

"[T]he starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (citation omitted). Section 11 creates a private right of action in cases where a registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a ma-

terial fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). In construing that language, the Court must "give effect, if possible, to every clause and word of [the] statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citation omitted). Section 11 does not impose liability for all untrue statements; instead, it imposes liability only for untrue statements of material *fact*. The word "fact" thus limits the types of statements that can give rise to liability under Section 11.

As a matter of common sense, an opinion is not a "fact." The word "fact" conveys, and conveyed at the time of the Securities Act, an element of certainty. See, *e.g.*, *Webster's Third New International Dictionary of the English Language Unabridged* 813 (2002) (defining "fact" as, *inter alia*, "a thing done," "something that has actual existence," and "a verified statement or proposition"); *Webster's New International Dictionary of the English Language* 782 (1930) (defining "fact" as, *inter alia*, "[a] thing done," "[a]n actual happening in time or space," and "an occurrence, quality, or relation, the reality of which is manifest in experience or may be inferred with certainty"). An opinion, by contrast, is an inherently uncertain assessment. See, *e.g.*, Restatement (Second) of Torts § 538A (1977) (defining statement of opinion as a statement of "the belief of the maker, without certainty, as to the existence of a fact" or of "his judgment as to quality, value, authenticity, or other matters of judgment").

A statement of opinion or belief, however, does convey one fact: the fact that the speaker actually held the stated belief. In the context of this case, when Omnicare stated that "[w]e believe that we are in compliance in all material respects with state and federal regulations applicable to our business," J.A. 164, it conveyed the fact

that it held the stated belief. If that fact was true—if Omnicare did in fact hold the stated belief—then the statement did not contain an "untrue statement of a material fact." 15 U.S.C. 77k(a). Nor would there be any other "fact" that would need to be disclosed in order to render the statement "not misleading." *Ibid.* To survive a motion to dismiss, therefore, respondents would have to plead facts plausibly demonstrating that Omnicare did not actually believe that it was in legal compliance.[3]

B. In *Virginia Bankshares*, This Court Correctly Held That A Statement Of Opinion Or Belief Is Actionable Only As A Statement Of The 'Psychological Fact' Of The Speaker's Belief

This Court's decision in *Virginia Bankshares*, which construed materially identical text in another provision of the federal securities laws, confirms the foregoing reading of Section 11.

1. *Virginia Bankshares* involved a proxy solicitation in which a company's directors stated that they had approved a merger proposal "because of its opportunity for the minority shareholders to achieve a 'high' value [or] a 'fair' price[] for their stock." 501 U.S. at 1088. Section 14(a) of the Securities Exchange Act of 1934, as implemented by Rule 14a-9 thereunder, prohibits the solicitation of proxies by means of statements that are "false or misleading with respect to any material fact." 17 C.F.R. 240.14a-9(a). In *Virginia Bankshares*, several minority shareholders brought suit under Section 14(a), alleging that the directors did not in fact "believe[] that the price

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[3] Of course, a plaintiff must also demonstrate that the fact at issue was "material." 15 U.S.C. 77k(a). As with statements of fact, not all statements of opinion rise to the level of materiality. See *Virginia Bankshares*, 501 U.S. at 1097.

offered was high or that the terms of the merger were fair." 501 U.S. at 1088-1089. After a jury trial, the district court entered judgment for the plaintiffs, and the court of appeals affirmed. *Id.* at 1089.

In an opinion written by Justice Souter, this Court reversed. 501 U.S. at 1108. As is relevant here, the Court considered "the actionability *per se* of statements of reasons, opinion, or belief." *Id.* at 1090. The Court observed that such statements "by definition purport[] to express what is consciously on the speaker's mind." *Ibid.* As a result, the Court construed the jury's verdict as "finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed." *Ibid.* Because a statement of opinion "by definition" is a statement about what the speaker believes, the jury could have found the statements at issue to be false as to a "material fact" only insofar as the statements falsely conveyed the directors' actual opinion. *Ibid.*

The defendants contended that statements of reasons, opinions, or beliefs could not be actionable as statements of material fact as a categorical matter, because statements like the ones at issue fell "outside the readily provable realm of fact." 501 U.S. at 1091. The Court, however, disagreed, explaining that the reasons for a speaker's actions were facts that could be proven or disproven by evidence reflecting the speaker's state of mind. *Id.* at 1092-1093; see also *id.* at 1093 (stating that "expressions of [conclusory] judgments can be uttered *with knowledge of truth or falsity* just like more definite statements" (emphasis added)).

Having rejected the defendants' arguments in support of a categorical rule, the Court held that statements of reasons, opinions, or beliefs can be actionable under Section 14(a) as statements that are false as to a material

fact. 501 U.S. at 1095. Critically, however, the Court returned to the principle that, for a statement of opinion to be false, it must be made "with knowledge that the [speaker] did not hold the beliefs or opinions expressed." *Id.* at 1090. The Court stated that "[a] statement of belief may be open to objection * * * solely as a misstatement of the psychological fact of the speaker's belief in what he says": that is, because that "psychological fact" is the only "fact" that a statement of opinion or belief conveys. *Id.* at 1095.

The Court then addressed what it described as the "rare" case that involved "evidence solely of disbelief or undisclosed motivation without further proof that the statement was defective as to its subject matter." 501 U.S. at 1096. The Court was contemplating a situation in which the speaker did not hold the stated belief (or was not motivated by the stated reason), but the stated belief or reason turned out to be objectively correct. See *id.* at 1095. Unsurprisingly, the Court concluded that an objectively correct statement cannot give rise to liability in an action brought under Section 14(a). *Id.* at 1096. Instead, a plaintiff must prove that the statement *both* "misstate[d] the speaker's reasons [or belief]" and also "misle[d] about the stated subject matter." *Id.* at 1095.[4]

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[4] The requirement that the stated belief be objectively erroneous naturally stems from the materiality element: that is, the requirement that the statement at issue be a false statement of *material* fact. In *Virginia Bankshares*, the Court suggested that, as long as the belief was objectively correct, the mere fact that the speaker did not hold the stated belief—what the Court called "the impurities of a director's unclean heart"—would be immaterial. 501 U.S. at 1096 (internal quotation marks and citation omitted). This case does not present any issue concerning the validity or source of that requirement: as this case comes to the Court, it is undisputed that the stated belief must be objectively erroneous in order to give rise to liabil-

Justice Scalia concurred in part and concurred in the judgment. 501 U.S. at 1108-1110. In a short separate opinion, he agreed that a statement of opinion is false only insofar as it misrepresents the speaker's actual opinion:

> As I understand the Court's opinion, the statement, "In the opinion of the Directors, this is a high value for the shares" would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise.

Id. at 1108-1109.

Although Justice Scalia agreed with the Court that the statement at issue did not give rise to liability, he questioned whether the statement constituted a pure statement of opinion. 501 U.S. at 1109. Instead, Justice Scalia construed the statement at issue to be making two factual assertions: first, that "the board of directors acted for a particular reason," and second, that "that reason is correct." *Ibid.* As to the latter, Justice Scalia read the statement to be asserting that the merger proposal in fact achieved a "high" value for shareholders. *Ibid.* By contrast, he noted, if the stated reason had been preceded by the words "in [the directors'] estimation," it "would have set forth nothing but an opinion." *Ibid.* (emphasis and internal quotation marks omitted).

2. The Court's holding in *Virginia Bankshares* flowed from the text of Rule 14a-9, which (like Section 11 and other provisions of the federal securities laws) pro-

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ity, and the only issue in dispute is whether, in addition, the stated belief must not have been actually held. If the latter is also required, petitioners are entitled to dismissal. See pp. 38-39, *infra*.

hibits the making of any "statement which * * * is false or misleading with respect to any material fact" or which "omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. 240.14a-9(a).

As discussed above, the only *fact* conveyed by a statement of opinion is the "psychological fact" that the speaker held the stated opinion. 501 U.S. at 1095; see pp. 14-16, *supra*. If the statement accurately conveys the speaker's actual belief, the statement is not "false or misleading with respect to any material fact." 17 C.F.R. 240.14a-9(a). And because such a statement is not "false or misleading" with respect to the fact that the speaker held the stated belief, the speaker cannot be liable for failing to "state any material fact necessary in order to make the statements therein not false or misleading." *Ibid.*

To be sure, as Justice Scalia noted in his concurring opinion in *Virginia Bankshares*, there may be cases in which a statement of opinion or reason conveys more than the mere fact that the speaker held the stated opinion or was motivated by the stated reason. See 501 U.S. at 1109. For example, a statement of opinion may expressly disclose the basis for the opinion, such as where the opinion was formed as a result of an investigation. See, *e.g.*, *Deephaven Private Placement Trading, Ltd.* v. *Grant Thornton & Co.*, 454 F.3d 1168, 1175-1176 (10th Cir. 2006). In such a case, the statement would convey two facts: that the speaker held the stated opinion and that the opinion was formed as a result of the investigation. As Justice Scalia noted, moreover, in the particular context of a statement of reasons (as opposed to a pure statement of opinion or belief), the stated reason may itself constitute a statement of fact. Consider, for example, a statement that directors decided to buy a target

company because that company's revenues last year were $1 billion. That statement would convey both the psychological fact of the directors' motivation and the factual premise that the target company's revenues were $1 billion.

As the foregoing examples demonstrate, whether a statement of opinion or belief discloses more than just the psychological fact of the belief will turn on the nature and content of the statement. But where a statement of opinion or belief does not contain an explicit representation about the factual basis for the belief, the only fact conveyed by the statement is the fact that the speaker possessed the stated belief. Accordingly, as *Virginia Bankshares* held, such a statement cannot be "false or misleadingly incomplete" if the speaker actually possessed the belief. 501 U.S. at 1095.

3. The principle that a statement of opinion or belief is actionable only insofar as it misrepresents the speaker's actual belief is also consistent with the common law of misrepresentation. "As a general rule, in order to constitute actionable fraud, a false representation must relate to a past or present * * * material fact." 37 Am. Jur. 2d *Fraud & Deceit* § 63 (West 2014) (footnotes omitted). The common law has long recognized that a statement of opinion or belief may be "factual" in the narrow sense that it conveys the "fact" that the speaker held the stated belief. See, *e.g.*, Restatement (First) of Torts § 525 cmt. c (1938) (noting that a person's "state of mind, such as * * * the holding of an opinion," is a "fact"). In the famous words of Lord Justice Cotton, "the state of a man's mind is as much a fact as the state of his digestion." *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483 (U.K. 1885); accord *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir.) (Hand, J.), cert. denied, 247 U.S. 507 (1918).

Because statements of opinion are factual only insofar as they convey the fact of the stated opinion, honest but ultimately erroneous statements of opinion are typically not actionable as false statements of fact under the common law of misrepresentation. See, *e.g.*, 37 C.J.S. *Fraud* § 45 (West 2014). That was true when the Securities Act was enacted, see, *e.g.*, *Seymour* v. *Chicago & N.W. Ry. Co.*, 164 N.W. 352, 354 (Iowa 1917), and it remains true today, see, *e.g.*, *Taylor* v. *AIA Services Corp.*, 261 P.3d 829, 843 (Idaho 2011).[5]

Indeed, even *dishonest* statements of opinion are not always actionable under the common law. In the context of ordinary arm's-length transactions, courts have frequently held that it was unreasonable for buyers to rely on sellers' statements of opinion. See, *e.g.*, *Howard* v. *Riggs National Bank*, 432 A.2d 701, 706 (D.C. 1981); *Deshatreaux* v. *Batson*, 131 So. 346, 348 (Miss. 1930). As a result, even if a plaintiff can prove that a statement of opinion is untrue because the speaker did not hold the opinion, the plaintiff may well be unable to prove that it was reasonable for him to rely on the statement. Before *Virginia Bankshares*, some commentators interpreted the federal securities laws to incorporate the same prin-

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[5] In some jurisdictions, statements of opinion are actionable at common law under the law of negligent misrepresentation. See, *e.g.*, *State College Area School District* v. *Royal Bank of Canada*, 825 F. Supp. 2d 573, 585-587 (M.D. Pa. 2011); *Lawyers Title Insurance Corp.* v. *Baik*, 55 P.3d 619, 624-625 (Wash. 2002) (en banc). Critically, however, in those jurisdictions, a claim for negligent misrepresentation does not require a false statement of material fact but could be based on "false information" or some broader category of statement. See, *e.g.*, *id.* at 624-625; see generally Restatement (Second) of Torts § 552 (1977). As a result, cases from those jurisdictions provide only limited guidance in applying the federal securities laws to statements of opinion.

ciple. See, *e.g.*, Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 249 (1933).

In discussing the materiality element of a federal securities claim in *Virginia Bankshares*, the Court implicitly departed from the common-law position, noting that "a statement of belief by corporate directors about a recommended course of action * * * can take on * * * importance." 501 U.S. at 1090-1091. In construing the falsity element, however, the Court expressly accepted the common-law principle that a statement of opinion is an assertion of fact only insofar as it misrepresents the "psychological fact" of the speaker's actual opinion. *Id.* at 1095.

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In sum, the Court's holding in *Virginia Bankshares* accords not only with the plain text of the provision of federal securities law that the Court was construing, but also with the common-law understanding of what it means for a statement of opinion to constitute an untrue statement of material fact. As we will now explain, the Sixth Circuit offered no valid justification for its refusal to construe materially identical language in Section 11 in the same manner, and its judgment should therefore be reversed.

C. The Sixth Circuit Erred By Refusing To Follow The Reasoning Of *Virginia Bankshares* In An Action Brought Under Section 11

In the decision below, the Sixth Circuit refused to apply *Virginia Bankshares*' construction of the falsity element of a Section 14(a) claim to materially identical language in Section 11. That holding defies the fundamental principle of statutory interpretation that the same term or phrase should be given a consistent meaning across related provisions. Nothing about Section 11,

including the absence of a scienter element, justifies departing from *Virginia Bankshares*' common-sense reasoning about what it means for a statement of opinion to constitute an untrue statement of material fact.

1. The Phrase 'Untrue Statement Of A Material Fact' Should Be Construed Consistently Across The Federal Securities Laws

a. As discussed above, in *Virginia Bankshares*, the Court construed the language in Rule 14a-9 that prohibits the making of any "statement which * * * is false or misleading with respect to any material fact" or which "omits to state any material fact necessary in order to make the statements therein not misleading." 17 C.F.R. 240.14a-9(a). Materially identical language prohibiting the making of "false" or "untrue" statements of material fact pervades the federal securities laws, including not just Section 11 but numerous other provisions of the Securities Act and the Securities Exchange Act and the regulations implementing those statutes.[6]

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[6] See, *e.g.*, 15 U.S.C. 77d-1(c)(2)(A) (Section 4A(c)(2)(A) of the Securities Act); 15 U.S.C. 77*l*(a)(2) (Section 12(a)(2) of the Securities Act); 15 U.S.C. 77q(a)(2) (Section 17(a)(2) of the Securities Act); 15 U.S.C. 77x (Section 24 of the Securities Act); 15 U.S.C. 78i(a)(4) (Section 9(a)(4) of the Securities Exchange Act); 15 U.S.C. 78n(e) (Section 14(e) of the Securities Exchange Act); 15 U.S.C. 78*o* (b)(4)(A) (Section 15(b)(4)(A) of the Securities Exchange Act); 15 U.S.C. 78r(a) (Section 18(a) of the Securities Exchange Act); 15 U.S.C. 78ff(a) (Section 32(a) of the Securities Exchange Act); 17 C.F.R. 240.10b-5(b) (Securities Exchange Act Rule 10b-5(b)); 17 C.F.R. 240.13e-4(j)(1)(ii) (Securities Exchange Act Rule 13e-4 (j)(1)(ii)); 17 C.F.R. 240.14c-6(a) (Securities Exchange Act Rule 14c-6(a)); see also 15 U.S.C. 77p(b) (Section 16(b) of the Securities Act); 15 U.S.C. 77z-2(c)(1) (Section 27A(c)(1) of the Securities Act); 15 U.S.C. 78u-5(c)(1) (Section 21E(c)(1) of the Securities Exchange

"A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994); see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005). Moreover, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion); see *United States* v. *Castleman*, 134 S. Ct. 1405, 1417 (2014) (Scalia, J., concurring in part and concurring in the judgment). The principle of consistent interpretation carries special weight when the provisions at issue are "interrelated components" of an integrated "regulatory scheme"—here, the laws that govern the nation's securities markets. *Hochfelder*, 425 U.S. at 206. And in this very context, the Court has repeatedly recognized the need to construe provisions of the federal securities laws with the goal of ensuring consistency between the Securities Act and the Securities Exchange Act and their implementing regulations—and across the securities laws more generally. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 179 (1994); *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 6-8 (1985); *Hochfelder*, 425 U.S. at 206-211.

The Sixth Circuit's decision flouts that principle of statutory interpretation. Under the Sixth Circuit's approach, the meaning of the phrase "untrue statement of a material fact" would vary across the securities laws, depending on whether the provision at issue contains a

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Act); 17 C.F.R. 240.3b-6(d) (Securities Exchange Act Rule 3b-6(d)); 17 C.F.R. 240.15c1-2(b) (Securities Exchange Act Rule 15c1-2(b)).

scienter requirement. That approach is both illogical and impractical. Where scienter is an element of liability under the securities laws, it is distinct from the element of falsity. See, *e.g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1317 (2011) (listing the elements of a Section 10(b) claim). The Sixth Circuit's approach conflates those elements by allowing the meaning of the latter element to fluctuate depending on whether a plaintiff must prove the former. As a result, where, as here, a plaintiff brings claims under multiple provisions of the securities laws, the same statutory phrase would have different meanings under different provisions. The securities laws contain no hint that Congress intended that peculiar outcome.

b. Petitioners have been unable to identify any other case in which a court has held that the phrase "untrue statement of a material fact" should be given a different meaning for purposes of Section 11. Lower courts have routinely applied the reasoning of *Virginia Bankshares* to claims involving statements of opinion or belief not only under Section 11, but across the securities laws.[7]

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[7] See, *e.g.*, *City of Omaha Civilian Employees' Retirement System* v. *CBS Corp.*, 679 F.3d 64, 67-68 (2d Cir. 2012) (per curiam) (Sections 10(b) and 20(a) of the Securities Exchange Act); *Fait* v. *Regions Financial Corp.*, 655 F.3d 105, 111 (2d Cir. 2011) (Sections 11 and 12(a)(2) of the Securities Act); *Rubke* v. *Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (Section 11 of the Securities Act and Section 10(b) of the Securities Exchange Act); *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 49 (1st Cir. 2005) (Sections 10(b) and 20(a) of the Securities Exchange Act); *Nolte* v. *Capital One Financial Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) (Section 10(b) of the Securities Exchange Act); *Greenberg* v. *Crossroads Systems, Inc.*, 364 F.3d 657, 670 (5th Cir. 2004) (same); *In re Donald J. Trump Casino Securities Litigation*, 7 F.3d 357, 368 (3d Cir. 1993) (Sections 11 and 12 of the Securities Act and Sections 10(b), 15, and

Relying on *Virginia Bankshares*, those courts have held that a statement of opinion constitutes an untrue statement of material fact only if it was "disbelieved by the defendant at the time it was expressed." *Fait* v. *Regions Financial Corp.*, 655 F.3d 105, 110 (2d Cir. 2011) (Section 11 and Section 12(a)(2) claims); see, *e.g.*, *Rubke* v. *Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (Section 11 claim). Consistent with *Virginia Bankshares*, those courts have also required plaintiffs to plead and prove that the stated belief was erroneous as an objective matter. See, *e.g.*, *Fait*, 655 F.3d at 110; *Rubke*, 551 F.3d at 1162.

In short, courts considering claims based on statements of opinion, whether under Section 11 or under other provisions of the securities laws, have correctly read *Virginia Bankshares* to hold that "liability lies only to the extent that the statement was both objectively false *and* disbelieved by the defendant at the time it was expressed." *Fait*, 655 F.3d at 110 (emphasis added). Among those decisions, the Sixth Circuit's decision stands as a conspicuous outlier.

2. *There Is No Valid Justification For Giving The Phrase 'Untrue Statement Of A Material Fact' A Different Meaning In An Action Under Section 11*

In deviating from this Court's understanding in *Virginia Bankshares* of what it means for a statement of opinion to be an untrue statement of material fact, the Sixth Circuit relied on the strict-liability nature of Section 11. Specifically, the Sixth Circuit reasoned that,

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20(a) of the Securities Exchange Act), cert. denied, 510 U.S. 1178 (1994); *Bricklayers & Masons Local Union No. 5 Ohio Pension Fund* v. *Transocean Ltd.*, 866 F. Supp. 2d 223, 244 (S.D.N.Y. 2012) (Section 14(a) of the Securities Exchange Act).

"[n]o matter the framing, once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim"—and, for that reason, it concluded that *Virginia Bankshares* has "very limited application" to an action under Section 11. J.A. 47, 50. But Section 11 requires an untrue statement of a material *fact*, and a statement of opinion satisfies that requirement only if it misstates the speaker's belief. Neither the absence of a scienter requirement nor any other feature of Section 11 requires departing from *Virginia Bankshares* in this case.

a. The absence of a scienter requirement in an action under Section 11 does not affect the meaning of the distinct statutory requirement of an "untrue statement of a material fact."

i. The Sixth Circuit fundamentally erred when it concluded that this Court's holding in *Virginia Bankshares* was limited to securities claims that require scienter. In *Virginia Bankshares*, the Court based its subjective-disbelief requirement not on the scienter element of liability under Rule 14a-9, but rather on the falsity element: *i.e.*, the requirement that there be a false statement of material fact. See, *e.g.*, 501 U.S. at 1091 (stating that "the question remains whether statements of reasons, opinions, or beliefs are statements 'with respect to * * * material fact[s]' so as to fall within the strictures of the Rule" (alterations in original)). Indeed, the Court expressly *reserved* the question whether scienter was a required element of a Section 14(a) claim, *id.* at 1090 n.5—thus belying the proposition that the Court was re-

lying on the presence of a scienter element in holding that a showing of subjective disbelief was required.[8]

Ultimately, whether Section 14(a) requires scienter is wholly irrelevant here. This Court did not decide that question in *Virginia Bankshares*—and it had no reason to. Instead, the Court required a showing of subjective disbelief because that is what makes a statement of opinion "false" or "misleading" under Rule 14a-9. The Court's holding applies with equal force in actions under Section 11.

ii. Construing the "untrue statement of a material fact" element of Section 11 to require a showing that the speaker did not actually hold the stated belief would not somehow import a scienter requirement into that section. The Sixth Circuit reasoned that, because the honesty of the speaker's stated belief would be relevant to the scienter requirement of Rule 10b-5, that fact could not be relevant to any element of Section 11. As a matter of law and logic, however, that is simply not so: the same facts may be relevant to multiple elements of a claim. See, *e.g.*, *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

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[8] The Sixth Circuit's reading of *Virginia Bankshares* seems to have been driven, at least to some extent, by its own view that Section 14(a) requires scienter. See J.A. 50 (citing *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 430 (6th Cir. 1980), for the proposition that "§ 14(a) does in fact require proof of scienter"). In this respect as well, however, the Sixth Circuit is an outlier: since *Virginia Bankshares*, most courts of appeals to have considered the issue have concluded that Section 14(a) does *not* require scienter. See, *e.g.*, *Beck* v. *Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009); *California Public Employees' Retirement System* v. *Chubb Corp.*, 394 F.3d 126, 143-144 (3d Cir. 2004).

More broadly, even if it is true that the same facts might be relevant to both the "untrue statement of a material fact" element and the scienter element of some *other* claim (such as a claim under Rule 10b-5), requiring a plaintiff to prove that the speaker did not possess the stated belief does not eliminate the strict-liability nature of Section 11. For one thing, that requirement applies only to statements of opinion or belief; it has no application in garden-variety cases involving ordinary statements of fact.

Even in the context of statements of opinion, moreover, requiring a plaintiff to prove subjective disbelief is entirely consistent with the imposition of strict liability. Section 11 imposes liability on a number of specifically enumerated defendants beyond the issuer, including underwriters, the issuer's directors, and persons who sign or certify the registration statement. See 15 U.S.C. 77k(a). The element of falsity will require factual allegations and proof that the *speaker* of the statement (usually the issuer) did not hold the stated belief.[9] If the plaintiff satisfies this burden, a Section 11 defendant may be strictly liable, whether or not the defendant is the speaker that held the expressed belief. The statute thus retains its strict-liability nature, even in the context of statements of opinion.

b. Nor would construing Section 11's "untrue statement of a material fact" element consistently with *Virginia Bankshares* render the section's affirmative defenses superfluous in cases involving statements of opinion.

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[9] By contrast, a scienter element would require factual allegations and proof related to the state of mind of the *defendant*, who may or may not be the speaker of the statement.

Section 11 permits defendants other than the issuer to avoid liability by proving, as an affirmative defense, that they "had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true." 15 U.S.C. 77k(b)(3). In the context of an ordinary statement of fact, this defense permits defendants to show that they believed, and had reasonable grounds to believe, that the asserted fact was true.

The defense operates in the same manner in the context of a statement of opinion. As discussed above, all Section 11 defendants are strictly liable for a statement of opinion where the statement misstates the speaker's belief. In such cases, the good-faith affirmative defense allows defendants other than the speaker to avoid liability by showing that they believed the speaker held the stated belief (and had reasonable grounds to do so)—even if the speaker actually did not. In other words, the element of falsity relates to the subjective belief of the speaker, but the affirmative defense involves the subjective belief of a defendant who may not be the speaker.

c. In a related vein, respondents argued below that statements of opinion are actionable under Section 11 notwithstanding *Virginia Bankshares* because, as part of the Private Securities Litigation Reform Act of 1995 (PSLRA), Congress created a safe harbor for some forward-looking statements made without knowledge of their falsity. See 15 U.S.C. 77z-2(c)(1)(B), 78u-5(c)(1)(B). According to respondents, Congress' adoption of this safe harbor, which applies to actions brought under Section 11, would have been meaningless if forward-looking statements made without knowledge of their falsity were not "untrue statements of a material fact" in the first place.

In enacting the safe harbor, however, Congress specifically noted that it did not intend for the safe harbor to displace judicial efforts to construe the affirmative elements of the securities laws. See Conf. Rep. No. 369, 104th Cong., 1st Sess. 43, 46 (1995). Instead, the primary innovation of the PSLRA was its creation of procedural mechanisms for ensuring the prompt dismissal of claims based on certain forward-looking statements. See 15 U.S.C. 77z-2(e)-(f), 78u-5(e)-(f). It thus does not follow from the enactment of the safe harbor either that statements protected by the safe harbor were actionable before the PSLRA, or that statements not protected by the safe harbor were actionable after it.

* * * * *

In short, there is no valid justification for refusing to construe Section 11 in the same way that the Court construed Rule 14a-9 in *Virginia Bankshares*. The Court should hold that statements of opinion or belief are actionable under Section 11 only if they misstate the speaker's belief, and reverse the Sixth Circuit's contrary holding.

D. The Sixth Circuit's Interpretation Would Lead To After-The-Fact Second-Guessing, Chill The Voluntary Disclosure Of Information, And Discourage Settlements

Under the Sixth Circuit's approach, liability for a statement of opinion or belief under Section 11 would turn solely on a hindsight determination of objective "correctness." That view would turn Section 11 into a vehicle for plaintiffs and their lawyers to second-guess subjective opinions expressed in registration statements, often based on later events that were unknowable to the issuer at the time. The prospect of liability by hindsight is particularly acute in the context of statements con-

cerning legal compliance, which are necessarily infused with the issuer's judgment as to uncertain future events.

To avoid the prospect of such liability, issuers may simply stop providing voluntary disclosures about their legal and regulatory environments like the ones at issue here. The Sixth Circuit's approach thus threatens to undermine a foundational principle of the securities laws: that the markets function best when investors have access to more, not less, information.

1. The "practical consequences" of reading Section 11 to impose liability based on unpredictable future events that render a belief objectively erroneous provide an additional reason to reject the Sixth Circuit's approach. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Even more than other provisions of the securities laws, provisions that impose strict liability "demand[] certainty and predictability." *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988) (discussing Section 12 of the Securities Act). This Court has warned that strict-liability provisions should be construed to provide "predictive value to participants in securities transactions." *Ibid.*

The Sixth Circuit's interpretation of Section 11, however, would do just the opposite. Under that interpretation, an issuer could be strictly liable for a stated belief based entirely on future developments, no matter what the issuer actually believed at the time. So long as a plaintiff could show, with the benefit of hindsight, that the issuer's belief was mistaken, the issuer would be strictly liable. This reading would improperly "introduce[] an element of uncertainty" and unpredictability into Section 11. *Pinter*, 486 U.S. at 652.

It is no answer to say, as the Sixth Circuit did, that Congress did not include a scienter element in Section 11. Congress confined liability under Section 11 (and

other securities provisions) to untrue statements of material *fact*. It is one thing to hold issuers strictly liable for untrue statements of present or historical fact. Consider, for example, a statement that an issuer purchased an asset for a certain amount. That amount is objectively verifiable, both at the time the issuer makes the statement and in subsequent litigation. Imposing strict liability for such statements does not render an issuer's liability unpredictable.

But it is quite another thing to hold issuers strictly liable for mistaken statements of opinion on matters of judgment. Under the Sixth Circuit's approach, an issuer's liability for statements of opinion would often turn on future events that reveal the judgment to have been incorrect when made. That would amount to liability by hindsight. Cf. *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.) (rejecting a claim of "fraud by hindsight" that alleged the defendants should have had "greater clairvoyance" at the time of the challenged statements). If anything, the strict-liability nature of Section 11 counsels against permitting such liability, not in favor of it, because of the heightened importance of certainty and predictability in strict-liability regimes.

2. The practical problems arising from the Sixth Circuit's holding are particularly acute in the context of statements concerning legal compliance, such as the ones at issue here. A statement can express an opinion in one of two ways: it can state "(a) the belief of the maker, without certainty, as to the existence of a fact," or "(b) his judgment as to quality, value, authenticity, or other matters of judgment." Restatement (Second) of Torts § 538A (1977).

Legal compliance is undeniably a "matter of judgment." A legal opinion given today could change or be rendered obsolete tomorrow. An assertion of legal com-

pliance cannot be definitively true or false at the time it is made except in the rare case in which a court has already definitively ruled on the legality of the issuer's actions. The ultimate accuracy of the stated belief hinges on future events and the decisions of judges, juries, and regulators. Assessing legal compliance thus calls for an exercise of judgment about unknowable future events. See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70 Va. L. Rev. 965, 968-969 (1984).[10]

This case amply proves the point. Omnicare repeatedly emphasized that its statements depended on certain assumptions. For example, it stressed that its statements were "made on the basis of management's views and assumptions regarding business performance as of the time the statements [we]re made." J.A. 145. At the same time, Omnicare disclosed that its business may be affected by "known and unknown risks, uncertainties, contingencies and other factors that could cause actual results, performance or achievements to differ materially from those stated." J.A. 149. Those risks included the

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[10] Although statements about legal compliance are by their very nature statements of opinion, Omnicare explicitly signaled to readers that its statements reflected its subjective belief by using the introductory phrase "we believe." See, *e.g.*, J.A. 202. That phrase naturally signals an opinion, rather than a fact. As the Restatement explains, "'I believe that there are ten acres here,' is a different statement, in what it conveys, from 'The area of this land is ten acres.'" Restatement (Second) of Torts § 538A cmt. c (1977). While the latter statement conveys a fact, the former puts the listener on notice that the speaker is uncertain and is conveying only his own subjective belief. *Ibid.*; see *Virginia Bankshares*, 501 U.S. at 1109 (Scalia, J., concurring in part and concurring in the judgment) (explaining that a statement prefaced by "*in their estimation*" "set[s] forth nothing but an opinion").

possibility that the relevant "laws may * * * be interpreted in the future in a manner inconsistent with our interpretation and application," J.A. 95-96, as well as "the effect of new legislation, government regulations, and/or executive orders," and "the outcome of litigation," J.A. 150-151. When read in context, therefore, the statements at issue stand only for the proposition that, although Omnicare believed it was in material compliance with the law, it might be wrong; the government may interpret the law differently; it might be sued; and if it were found to have violated the law, the consequences could be severe.

As this case illustrates, statements such as Omnicare's about legal compliance are necessarily subjective and will be especially vulnerable to second-guessing by plaintiffs. The Sixth Circuit's approach would hold issuers strictly liable for those inherently uncertain statements, even when the opinions contained in the statements were actually held at the time they were stated. And the risk of liability by hindsight would only be heightened for companies such as Omnicare that operate in highly regulated and rapidly changing industries.

Given the potential for massive liability based on nothing more than an issuer's genuinely expressed beliefs about its legal compliance, adopting the Sixth Circuit's approach would inevitably chill such disclosures. Because there is no categorical "affirmative duty to disclose" even "material information," "companies can control what they have to disclose * * * by controlling what they say to the market." *Matrixx Initiatives*, 131 S. Ct. at 1321-1322. Under the Sixth Circuit's approach, voluntary disclosures about an issuer's legal and regulatory environment would become "rite[s] of confession" in which issuers would not be able to express their belief that they are in legal compliance without disclosing the

many ways in which they might not be. See *City of Pontiac Policemen's & Firemen's Retirement System* v. *UBS AG*, ___ F.3d ___, No. 12-4355, 2014 WL 1778041, at *5 (2d Cir. May 6, 2014) (citation omitted). The more likely alternative to such self-flagellation is that issuers would simply say less, or nothing, about the legal environment and accompanying risks.

As both this Court and the SEC have recognized, a statement of management's subjective opinions may be valuable to the investing public. See *Virginia Bankshares*, 501 U.S. at 1090-1091; Securities and Exchange Commission, Statement on the Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362, 1 SEC Docket 4 (Feb. 2, 1973). In such cases, disclosing statements of opinion advances a central goal of the securities laws: to give investors helpful information. See *Central Bank*, 511 U.S. at 171 (stating that the securities laws "embrace a fundamental purpose * * * to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*" (alteration in original) (citation omitted)); *Hochfelder*, 425 U.S. at 195 (noting that "[t]he Securities Act of 1933 * * * was designed to provide investors with full disclosure of material information concerning public offerings of securities" (citation omitted)). The Sixth Circuit's approach would make less information, not more, available to investors.

Finally on this score, imposing Section 11 liability for opinions concerning legal compliance would also discourage issuers from settling litigation. Whenever an issuer has previously expressed an opinion about legal compliance in a registration statement, the Sixth Circuit's approach would necessarily prompt the issuer to weigh the value of settlement against the very real risk that the settlement could prompt a claim, even years later, for strict liability based on its previous statements. That

would undermine the longstanding judicial policy of encouraging resolution by compromise. See, *e.g.*, *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202, 215 (1994); *Williams* v. *First National Bank*, 216 U.S. 582, 595 (1910). This case amply illustrates that proposition: in support of their contention that petitioners' statements concerning Omnicare's legal compliance were false, respondents heavily relied on unproven allegations taken from complaints in several *qui tam* actions that had been filed against, and were later settled by, Omnicare (with no finding or admission of liability). See J.A. 191-231, 243-248.

E. Because Respondents Disclaimed Any Allegation of Subjective Disbelief, They Failed To State A Claim Under Section 11

Should this Court agree with petitioners that a statement of opinion or belief is actionable under Section 11 only if the speaker did not hold the stated belief, the Court should reverse the court of appeals' judgment and thereby reinstate the district court's dismissal of respondents' Section 11 claim.

In the operative version of the complaint, respondents stated as follows: "Plaintiffs expressly exclude and disclaim any allegation that could be construed as alleging fraud or intentional or reckless misconduct, as this claim is based solely on the theories of strict liability and negligence under the Securities Act." J.A. 273. Because respondents expressly disclaimed any allegation of knowing misconduct, they necessarily disclaimed an allegation that Omnicare (or any of the other petitioners) did not hold the stated beliefs about legal compliance.

Respondents made a strategic decision to include this disclaimer in an effort to circumvent the court of appeals' earlier holding that, because their allegations sounded in fraud, they were subject to the heightened pleading re-

quirements of Rule 9(b). See Pet. App. 66a. Rather than attempting to satisfy those heightened pleading requirements, respondents opted instead to include the disclaimer and to argue that subjective disbelief is not required, as a matter of law, to establish that a statement of opinion or belief is untrue under Section 11.

If this Court rejects the court of appeals' interpretation of Section 11, it should hold respondents to their strategic gambit and conclude that respondents' disclaimer compels dismissal. And because the court of appeals' interpretation cannot be sustained, the Court should reverse its judgment and reinstate the district court's dismissal of respondents' Section 11 claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

HARVEY KURZWEIL
RICHARD W. REINTHALER
JOHN E. SCHREIBER
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166

ANDREW C. NICHOLS
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
JOSEPH M. TERRY
JOHN S. WILLIAMS
A. JOSHUA PODOLL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

JUNE 2014

APPENDIX

APPENDIX

15 U.S.C. 77k provides:

Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the regis-

tration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert

(other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has

become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any

suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
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No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., *et al.*,

Petitioners,

—v.—

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue NW,
Washington, DC 20015

KEVIN L. MURPHY
GRAYDON HEAD
& RITCHEY LLP
2400 Chamber Center Drive,
Suite 300
Fort Mitchell, Kentucky 41017

DARREN J. ROBBINS
ERIC ALAN ISAACSON
(*Counsel of Record*)
erici@rgrdlaw.com
HENRY ROSEN
JOSEPH D. DALEY
STEVEN F. HUBACHEK
AMANDA M. FRAME
SUSANNAH R. CONN
DAVID J. HARRIS, JR.
ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway,
Suite 1900
San Diego, California 92101
(619) 231-1058

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QUESTION PRESENTED

Whether an objectively incorrect statement of opinion is actionable under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, only if it was subjectively disbelieved by the defendant.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Omnicare, Inc. ("Omnicare"), Joel F. Gemunder, David W. Froesel, Jr., Cheryl D. Hodges, the estate of the late Edward L. Hutton, and Sandra E. Laney.

Respondents are the Laborers District Council Construction Industry Pension Fund and the Cement Masons Local 526 Combined Funds.

In addition to the above-listed parties, Indiana State District Council of Laborers and Hod Carriers Pension Fund was originally a named plaintiff in the district court.

Pursuant to Supreme Court Rule 29.6, Respondents disclose that neither the Laborers District Council Construction Industry Pension Fund nor the Cement Masons Local 526 Combined Funds has a parent corporation, issues stock, or is owned or controlled by a publicly traded corporation.

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STATEMENT OF THE CASE

Petitioner Omnicare is the nation's largest provider of pharmaceutical-care services for elderly residents of long-term care facilities, serving more than 1.4 million patients nationwide. J.A. 180-81. From at least 2000, and until its scheme was revealed to state and federal authorities, Omnicare accepted unlawful kickbacks from drug companies for persuading doctors to switch patients to the companies' products. Omnicare also paid kickbacks itself in order to continue providing pharmacy services to certain nursing homes.

While the scheme was ongoing, Omnicare executed a December 2005 stock offering to raise more than three-quarters of a billion dollars from investors. In its registration statement, required to be filed with the Securities and Exchange Commission (SEC), Omnicare informed investors that accepting payments for persuading doctors to switch patients to a company's medications was illegal. It then insisted that it believed that its own relationships with drug companies complied with all applicable state and federal laws. Those statements naturally conveyed to potential purchasers of the shares the materially false and misleading message that Omnicare was not accepting payments in exchange for promoting particular medications.

The district court accepted petitioners' argument that their statements regarding legal compliance amounted to expressions of opinion that could be actionably false under Section 11 of the Securities Act of 1933 (the "1933 Act") only if petitioners did not subjectively believe their own claims. The Sixth Circuit rejected that categorical position and remanded for further proceedings.

I. Statutory Background

This case concerns liability under Section 11 of the 1933 Act, an integral part of a federal regulatory scheme enacted in the wake of the abuses of the 1920s and the stock-market crash of 1929. 15 U.S.C. § 77a, *et seq.* "The essential purpose of the statute is to protect investors by requiring publication of certain information concerning securities before offered for sale." *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40 (1941); *accord, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571-72 (1995); *Pinter v. Dahl*, 486 U.S. 622, 638 (1988); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 & n.10 (1953). Its provisions thus are specifically "designed to provide investors with full disclosure of material information concerning public offerings of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

A securities offering under the 1933 Act is a uniquely rigorous undertaking. The statute forbids issuance of securities in interstate commerce unless the issuer has registered its offering with the SEC. 15 U.S.C. § 77e. The registration statement is required to contain specified information material to investors. *See* 15 U.S.C. §§ 77g, 77aa. It must also at a minimum include certain opinions, including the opinion of an independent or certified accountant and the "opinions of counsel in respect to the legality of the issue." 15 U.S.C. §§ 77aa(25)-(27), 77aa(29); *see United States v. Arthur Young & Co.*, 465 U.S. 805, 810-11 & n.5, 818-19 nn.13-14 (1984). An issuer may, of course, choose to include additional opinions (either its own or of consenting professionals) that will be material to investors deciding whether to purchase its securities.

The registration statement is vetted by underwriters, and it must be personally "signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors." 15 U.S.C. § 77f(a)(1). It also must be accompanied by formal written consent of any professional identified as having prepared or certified any portion of it, or any "report or valuation" that it includes. 15 U.S.C. § 77g(a)(1).

The statute leaves compliance neither to chance nor to good intentions – nor indeed to implication. Section 11 creates an express cause of action for investors who purchased a security issued pursuant to any registration statement that, when it

> became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .

15 U.S.C. § 77k(a). The cause of action runs against "every person who signed the registration statement," as well as the issuer's directors, underwriters, and "every accountant, engineer, or appraiser" or other professional "who has with his consent been named as having prepared any part of the registration statement, or as having prepared any report or valuation which is used in connection with the registration statement." *Id.* § 77k(a)(1)-(5).

Under Section 11, "[l]iability against the issuer of a security is virtually absolute." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); *see Hochfelder*, 425 U.S. at 208. The plaintiff need not prove that the false or misleading statement was intended to deceive

or that the defendant otherwise acted with a bad purpose. *Huddleston*, 459 U.S. 382; *Hochfelder*, 425 U.S. at 208. Instead, the plaintiff "need only show a material misstatement or omission to establish his *prima facie* case." *Huddleston*, 459 U.S. at 382.

But while "Section 11 places a relatively minimal burden on a plaintiff," it also is quite "limited in scope," *id.*, with liability explicitly bound and carefully tempered in several respects.

First, Section 11 applies only to false or misleading statements and omissions in registration statements, which are documents containing "'the basic information by which the public is solicited.'" *Gustafson*, 513 U.S. at 581 (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess., at 9 (1933)).

Second, Section 11 provides an affirmative due-diligence defense to every defendant *other* than the issuer itself. 15 U.S.C. § 77k(b)(3). The statute precludes liability when a non-issuer defendant proves that

> he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .

Id. § 77k(b)(3); *see Hochfelder*, 425 U.S. at 208 & n.26.[1] In determining "what constitutes reasonable

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[1] The precise wording of the defense varies depending on the type of defendant, and some defendants are offered other

investigation and reasonable ground for belief," Congress adopted the common-law standard applied to fiduciaries, requiring that the defendant act with the reasonableness "required of a prudent man in the management of his own property." 15 U.S.C. § 77k(c).[2]

"In effect," the statute subjects these non-issuers such as directors, underwriters, and auditors, to "a negligence standard," *Hochfelder*, 425 U.S. at 208, deliberately "'throw[ing] upon originators of securities a duty of competence as well as innocence.'" *Gustafson*, 513 U.S. at 581 (quoting H.R. Rep. No. 85, at 9).

Third, the statute provides limited remedies, akin to rescission, by sharply restricting damages to the difference between *the lower* of (1) the price paid or the offering price and (2) the value at the time of suit or the price at which the security was sold either prior to suit or after suit but prior to judgment (if this produces a smaller recovery). *See* 15 U.S.C. § 77k(e). Defendants may reduce the quasi-restitutionary award even further by showing "that any portion or

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defenses as well. *See* 15 U.S.C. § 77k(b); 9 Louis Loss, et al., *Securities Regulation* 319-24 (4th ed. 2013).

[2] As originally enacted, Section 11(c) provided that, "the standard of reasonableness shall be that required of a person occupying a fiduciary relationship." Pub. L. No. 73-22, §11(c), 48 Stat. 74, 83 (May 27, 1933). The Securities Exchange Act of 1934 (the "1934 Act") adopted the current text, which "removes possible uncertainties as to the standard of reasonableness by substituting for the [original] language the accepted common law definition of the duty of a fiduciary." H.R. Rep. No. 1838, 73d Cong., 2d Sess., at 41 (1934) (Conference Report); *see* 9 Loss, *Securities Regulation* at 321 & n.152.

all" of the investor's damages "represents other than the depreciation in value . . . resulting from" the misleading statements and omissions. 15 U.S.C. § 77k(e).

Section 11 thus contrasts starkly with Section 10(b) of the 1934 Act, which provides a catch-all proscription against "any manipulative or deceptive device or contrivance in contravention of" rules promulgated by the SEC. 15 U.S.C. § 78j(b); *see also* 17 C.F.R. § 240.10b-5(a), (b). Section 11's express (rather than implied) cause of action applies to a much narrower class of conduct and provides more limited remedies, but does not require proof of scienter (*i.e.*, the defendant's intent to deceive). *Huddleston*, 459 U.S. at 381-82; *Hochfelder*, 425 U.S. at 197; *see* 9 Loss, *Securities Regulation* at 393 ("Scienter, the hobgoblin of both common law deceit and Rule 10b-5, is foreign to the vocabulary of § 11 just as in the case of common law rescission . . .").

II. Factual Background

A. The Scheme.

Between 2000 and 2005, while providing pharmacy services for nursing-home patients, Omnicare systematically reviewed patient records, looking for opportunities to switch patients to higher-profit medications. Complaint ¶¶ 27-45.[3] In some instances, the change was motivated by the difference in profit-margin for Omnicare between the drugs. For

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[3] The Complaint is reproduced at J.A. 177-275. The Complaint was entitled "Proposed Second Amended Complaint," but the district court and Sixth Circuit have referred to it as the "Third Amended Complaint." *See* J.A. 38 n.2. We simply refer to it in this brief as the "Complaint."

example, Omnicare instituted an initiative to move patients from the tablet to capsule form of a generic antacid in order to avoid Medicaid and Medicare price caps on the tablet form (there being no price limit for the capsules because, at the time, they were rarely prescribed and were generally reserved for intubated patients). Complaint ¶¶ 40-45.

In other instances, Omnicare switched drugs in order to obtain illegal kickbacks from particular drug manufacturers in return for promoting their products. From 1997 until 2004, for example, Omnicare maintained a contract with Johnson & Johnson under which the drug manufacturer paid Omnicare millions of dollars to increase its "market share" of Omnicare's purchases for particular classes of drugs. One such medication was Risperdal, an antipsychotic medication approved by the Food and Drug Administration (FDA) to treat schizophrenia. Johnson & Johnson promised that if Omnicare increased Risperdal's share of its pharmacies' antipsychotic prescriptions from less than thirty-five percent to more than forty-two percent, Johnson & Johnson would make payments to Omnicare equal to eleven percent of the purchase price. Complaint ¶¶ 55, 67.

As only one percent of the elderly population has schizophrenia, Omnicare agreed with Johnson & Johnson to promote the drug to treat Alzheimer's disease and dementia, which were much more common in the facilities' population, even though the FDA had specifically rejected the drug for this use. *Id.* ¶¶ 7, 69. That was illegal. *See* 21 U.S.C. § 260aaa-6 (prohibiting promotion of drugs for off-label uses). It was also unsafe – Risperdal had been shown to increase the risk of stroke and death in dementia patients. Complaint ¶ 68. Nonetheless,

Omnicare created a "Patient Specific Therapeutic Interchange Protocol" to justify its use as an alternative to other medications for treating dementia and related behavioral problems. *Id.* ¶¶ 67, 69. Omnicare then searched its records to identify patients taking other antipsychotic medications and contacted their physicians to recommend a switch to Risperdal. Omnicare admonished its employees not to take "no" for an answer. In an internal memo, management emphasized: "It is imperative that each and every resident on a conventional antipsychotic be re-evaluated for appropriate conversion to an atypical antipsychotic," with Risperdal being the "'preferred' alternative." *Id.* ¶ 70. Omnicare also asked physicians to give its pharmacists blanket pre-authorization to substitute Risperdal for competitor drugs whenever a prescription for a competitor was received. *Id.* ¶ 71.

Omnicare and Johnson & Johnson initially characterized the payments as "rebates." But Johnson & Johnson became concerned that this label might trigger its obligations under the Medicaid Drug Rebate Statute, 28 U.S.C. § 1296r-8, to provide rebates to the Medicaid program as well. Complaint ¶ 59 & n.17. So the parties agreed that Johnson & Johnson would pay Omnicare the same amount of money, with the nicety that it would now say that the payment was instead in exchange for certain data that Omnicare was already providing Johnson & Johnson without charge, as well as for "consulting" and other unspecified "services." *Id.* ¶¶ 60, 61.

The agreements were extraordinarily lucrative for both Johnson & Johnson and Omnicare. One Johnson & Johnson memo estimated that the agreement annually generated over $100 million for Johnson & Johnson. *Id.* ¶ 74. Other memos noted

that Omnicare's pharmacists' recommendations to switch to Johnson & Johnson drugs were accepted "more than 80% of the time," a result that one executive described as "good for us but scary on the power to do this." *Id.* ¶¶ 75, 76. For its part in promoting Johnson & Johnson products – and delivering results – Omnicare was paid millions of dollars. *Id.* ¶ 62.

And that was just from one company. Omnicare negotiated similar arrangements with several other major pharmaceutical companies, inflating its revenue and profits by tens of millions of dollars. *Id.* ¶¶ 79-89, 115. Indeed, the arrangements were so profitable that Omnicare offered its pharmacy services to facilities at below-market rates and sometimes even paid facilities illegal kickbacks to retain the right to provide the facilities' pharmacy services. *See id.* ¶¶ 8, 93, 118-26; J.A. 339-42 (Department of Justice Press Release).

Taxpayers ultimately footed much of the bill. Omnicare submitted false claims for reimbursement from Medicaid and Medicare programs – in direct violation of both the federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, and its state-law analogs. Complaint ¶¶ 11, 92, 96-97; J.A. 289-90, 297 (Kammerer *qui tam* complaint ¶¶ 10, 39).

B. The 2005 Securities Issuance.

In the midst of its scheme, Omnicare completed a December 2005 public offering of 12.8 million shares of common stock, raising more than $765 million dollars. Complaint ¶ 23.

As required by federal securities law, Omnicare registered the offering with the SEC. In its

registration statement,[4] Omnicare explained that it was required to "comply with federal and state laws which govern financial and other arrangements between healthcare providers," including laws prohibiting filing of false claims with Medicaid or Medicare[5] and the "the federal anti-kickback statute," which it explained generally prohibits receiving payments to induce medical services or products paid for by the federal government. J.A. 94-95.[6] The

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[4] The registration statement incorporated by reference a number of documents already on file with the SEC, including, as relevant here, its 2004 Annual Report on Form 10-K. *See* Petr. Br. 4; J.A. 189-90.

[5] *See* False Claims Act, 31 U.S.C. §§ 3729 *et seq.*

[6] The federal Anti-kickback Statute authorizes criminal fines and imprisonment for anyone who:

> (1) . . . knowingly and willfully solicits or receives any remuneration (including any *kickback*, bribe, or *rebate*) directly or indirectly, overtly or covertly, in cash or in kind –
>
> * * *
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program . . . .

42 U.S.C. § 1320a-7b(b)(1) (emphasis added). The statute also prohibits the payment of any such "remuneration (including any *kickback*, bribe, or *rebate*)." *Id.* § 1320a-7b(b)(2) (emphasis added). The statute offers a limited exception for "a discount or other reduction in price" but only "if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under a Federal health care program." *Id.* § 1320a-7b(b)(3)(A).

registration statement acknowledged that Omnicare's "contractual relationships with pharmaceutical manufacturers can include rebates and other forms of price concessions on the products we purchase." J.A. 136. But it did not disclose that the "rebates" were being given *in exchange* for recommending drugs to patients and doctors (which would obviously violate the federal statute) rather than as ordinary quantity discounts (which would not).

Quite to the contrary, while it acknowledged that the federal Centers for Medicare and Medicaid Services had expressed "significant concerns about the continued payment of *certain* rebates by pharmaceutical manufacturers to long-term care pharmacies," Omnicare assured investors that it was not engaged in any such unlawful conduct. J.A. 136-37; Complaint ¶ 46 (emphasis added). Specifically, the registration statement stated:

> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.

J.A. 137 (registration statement); Complaint ¶ 46. Elsewhere, the registration statement reiterated:

Omnicare's rebates fall outside this exception because, among other things, Omnicare did not pass them on and concealed them from state and federal healthcare programs. Complaint ¶ 31 & n.9, ¶ 114; J.A. 302-03, 306-08, 310-12 (Kammerer *qui tam* complaint 282-314 ¶¶ 46, 51, 53-55, 58-60); *see* 42 C.F.R. §1001.952(h)(5)(i)-(iii).

> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.

J.A. 95-96 (10-K); Complaint ¶ 46.

The registration statement also included claims of legal compliance that were not cast as opinions. For example, petitioners asserted that "branded drugs are dispensed and generic drugs are substituted in accordance with applicable state and federal laws." J.A. 75 (10-K); Complaint ¶ 27. Petitioners also claimed that their pharmacy consulting services "help clients comply with the federal and state regulations applicable to nursing homes," including those that "pertain to drug use." J.A. 76-77 (10-K); Complaint ¶ 91.

C. The Scheme Exposed.

Omnicare's scheme subsequently came to light, with its misconduct fleshed out in suits filed against it and against Johnson & Johnson by *qui tam* relators, some taken over and litigated by the federal government or certain states.[7]

Among other things, the U.S. Department of Justice (DOJ) accused Johnson & Johnson of "causing Omnicare . . . to submit false claims to Medicaid as a result of numerous kickbacks that J&J paid to Omnicare in violation of the federal anti-kickback statute." J.A. 343. The DOJ also charged Omnicare

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[7] Complaints from several of these actions are incorporated in respondents' complaint as exhibits, excerpts from which appear in the Joint Appendix. *See* J.A. 282-314, 315-36, 343-79, 454-76.

itself with violating the Anti-Kickback Statute and the False Claims Act. *See* J.A. 339-42, 345-46.

To resolve the government's charges of systematic misconduct, Omnicare eventually entered into multiple settlements with federal and state authorities. *See, e.g.*, J.A. 339-42, 419-32, 433-38. One settlement required Omnicare to "pay $98 million plus interest . . . to the federal government and the participating states and the District of Columbia," J.A. 172-73 (Omnicare press release), to resolve claims arising from Omnicare's conspiracy with Johnson & Johnson to market Risperdal to patients with dementia. *See id.*; J.A. 339-42 (DOJ press release). Another made Omnicare pay $49.5 million to the United States and 43 states to resolve Medicaid-fraud claims related to improper drug-switching. J.A. 433; R59-18 (Omnicare press release); R59-20 at 38-39 (2006 10-K). Yet another settlement resolved "billing issues under the Michigan Medicaid program" by requiring Omnicare to "pay approximately $49.0 million to the State of Michigan." R59-17 (Omnicare press release); R59-20 at 38-39 (2006 10-K); *see* J.A. 419-32.

III. Procedural History

1. In 2006, investors filed class-action complaints against Omnicare, raising scienter-based securities-fraud claims under Section 10(b) of the 1934 Act for allegedly false and misleading statements made during a class period that included Omnicare's December 2005 public offering. With the cases consolidated, an amended complaint raised securities-fraud claims under Section 10(b) of the 1934 Act, challenging, as relevant here, certain claims of legal compliance that Omnicare made to the news media. It also alleged Section 11 violations arising from

alleged accounting irregularities in the registration statement.

After the district court dismissed the complaint, the Sixth Circuit affirmed in part, holding that each of Omnicare's challenged statements regarding legal compliance was actionable under Section 10(b) only if made "with knowledge of its falsity." Pet. App. 61a. Because the "complaint fail[ed] specifically to allege that defendants knew their statements of 'legal compliance' were false when made," the court affirmed dismissal of respondents' legal-compliance Section 10(b) claim. Pet. App. 62a. However, the court of appeals reversed the dismissal of respondents' Section 11 accounting claims, explaining that the district court had wrongly believed that the plaintiffs were required to plead "loss causation" when, in fact, loss causation is an affirmative defense. Pet. App. 66a-67a.

2. On remand, respondents amended their complaint to drop the dismissed Section 10(b) claims and strengthen their Section 11 claims. The new complaint now asserted liability under Section 11 not only for alleged accounting violations but also for the registration statement's representations regarding legal compliance. *See* Complaint ¶¶ 46-92, 178.

The district court again dismissed. Pointing to the Sixth Circuit's dismissal of respondents' Section 10(b) legal-compliance claims, the court held that Section 11 similarly required the plaintiffs to plead that Omnicare disbelieved its claims of lawful conduct. Pet. App. 38a.

b. The Sixth Circuit again reversed, rejecting the district court's and petitioners' categorical claim that statements cast as opinions can be actionably false only if subjectively disbelieved.

The court explained that it had affirmed the dismissal of the Section 10(b) claims relating to Omnicare's legal-compliance statements to the media because Section 10(b) requires scienter, not because it concluded that a statement of opinion can be misleading only if disbelieved. J.A. 45-47. And, the court observed, Section 11 does not require scienter, but instead imposes strict prima facie liability. J.A. 43, 50.

The court also rejected Omnicare's assertion that this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), requires objectively misleading opinions to be subjectively disbelieved in order to support liability under Section 11. J.A. 48-51.

Having rejected Omnicare's contention that a statement of opinion is actionable under Section 11 only if subjectively disbelieved by the defendant, the court did not go any further to decide what else a plaintiff may or may not need to prove to establish a Section 11 violation arising from a statement of opinion. Instead, the court moved on to consider and reject the only other grounds that Omnicare offered for affirming dismissal of the "legal compliance" claims: (1) its assertion that the complaint failed to satisfy the particularity requirement of Rule 9(b) due to its "reliance on *qui tam* complaints and confidential sources," J.A. 51-53; and (2) its claim that "the affirmative defense of loss causation is evident on the face of the complaint." J.A. 55-56.[8]

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[8] The court affirmed the dismissal of respondents' accounting-related allegations, applying the particularity requirement of Federal Rule of Civil Procedure 9(b). J.A. 53-55. Whether Rule 9(b) applies to Section 11 claims is the subject of a circuit conflict and is not before this Court. *See Wagner v. First Horizon*

Judge Gwin concurred, writing separately to emphasize that "the district court retains the statutory and inherent discretion to resurrect previously dismissed claims and previously dismissed parties should later discovered evidence warrant it." *Id.* at 57.

3. Omnicare petitioned for rehearing en banc, but no member of the court requested a vote on the petition. Pet. App. 2a. This Court subsequently granted certiorari. 134 S. Ct. 1490 (2014).

SUMMARY OF ARGUMENT

I. Petitioners' assertion that statements of opinion can be false or misleading only if subjectively disbelieved defies tradition, common sense, and the unique liability regime Congress established in Section 11 for the special context of registration statements.

A statement of opinion can be false or misleading in at least three ways. First, as petitioners emphasize, the speaker may not actually hold the asserted view. Second, regardless of the speaker's subjective beliefs, a statement of opinion may mislead the listener to a false conclusion about the subject matter of the opinion. For example, saying "we believe we have a working prototype" naturally induces investors to think that the company has a working prototype. If it does not, then investors will be misled, even if the speaker genuinely believed what he said. Third, a statement of opinion in a registration statement may reasonably be understood to imply that the speaker had a reasonable basis for the opinion, and that it

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Pharm. Corp., 464 F.3d 1273, 1277 (11th Cir. 2006) (noting conflict).

disclosed any facts tending to seriously contradict his view, which implication would be false if the speaker has no such basis for his opinion.

Subjecting defendants to Section 11 claims for such incorrect or baseless opinions fits the statute's purpose and design. Section 11 applies only to the special context of securities-offering registration statements, which must be prepared with particular care and with the expectation that investors will rely heavily on their content. The statute's express liability provisions were designed specifically to relieve plaintiffs of the burden of proving the defendant's knowledge of falsity and to shift to the issuer the risk that a registration statement is materially inaccurate or misleading.

II. Petitioners wrongly insist that this Court has already accepted their position, plucking language out of *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991). But the Court had no occasion to address the question presented here, even in dicta, having assumed that the statute at issue in that case, Section 14(a), required, and that the jury had found, intent to deceive. The Court *did* decide that apart from proving subjective disbelief, 1934 Act Section 14(a) plaintiffs must prove that a statement of opinion "expressly or impliedly asserted something false or misleading about its subject matter," beyond the fact that it was subjectively disbelieved. *Virginia Bankshares*, 501 U.S. at 1096. In doing so the Court necessarily rejected petitioners' premise here, that the only fact asserted by a statement of opinion is the fact that the speaker holds the purported belief.

Petitioners' complaints about subjecting defendants to liability "by hindsight" ignores the fact that Congress has provided every defendant except issuers

an affirmative defense barring liability so long as the defendant acted in good faith and with due diligence. All defendants, including issuers, are protected from liability for many forward-looking statements and opinions by a special provision specifically designed to address concerns that petitioners raise.

To be sure, some statements of opinion involve exercises of judgment. But that does not mean that such opinions can never be proven false or misleading unless disbelieved. A company that claims to believe its conduct is lawful would plainly mislead investors if the company was operating as a Ponzi scheme, obtaining contracts through bribery of government officials, or lying to evade taxes. When the question is closer, issuers can avoid misleading investors by disclosing the basis of their opinion – here, for example, Omnicare could have disclosed that it was accepting payments to recommend particular drugs to its patients and explained why it thought this was lawful.

For that reason, rejecting petitioners' position will encourage *more* disclosure, even while ensuring that more of the information conveyed to investors in registration statements is reliable.

III. Petitioners' rule is also irreconcilable with the text and purposes of Section 11, and federal securities laws more generally.

Section 11 expressly puts the burden of proving the defendant's state of mind on defendants. On petitioners' view, however, the plaintiff bears the burden of proving subjective disbelief so long as the defendants preface contestable assertions in their registration statement with "we believe." At the same time, the statute's affirmative defense is available only if the defendant acted with due diligence in

forming his beliefs; on petitioners' view, no such diligence is required – so long as an opinion is truly held, this genuine subjective belief is an absolute defense.

Petitioners' position would also render pointless the detailed exemptions and qualifications Congress placed on the statutory safe harbor for certain "forward-looking statements" expressing opinions about the future. Congress excluded from the safe harbor certain kinds of statements (*e.g.*, those in financial statements) from certain kinds of defendants (*e.g.*, those recently convicted of securities fraud). But those specifically excluded from the statutory safe harbor would nonetheless find shelter, on petitioners' theory, which would protect *all* genuinely held opinions, forward-looking and otherwise.

The harm of petitioners' rule would not be limited to private damages suits under Section 11. It also would prevent the SEC from using its administrative powers to require changes to grossly misleading statements of opinion in registration statements, so long as the issuer genuinely held its irresponsible beliefs. It would also prevent the Commission from seeking injunctive relief under other securities-law provisions that provide for liability without scienter, as well as under those that prohibit reckless conduct, since even reckless opinions can be genuinely held.

ARGUMENT

Petitioners issued a registration statement that assured potential investors, from whom they were soliciting hundreds of millions of dollars, that they believed Omnicare's contracts with drug companies were lawful. At no point in this litigation have they

tried to show that this opinion had any merit. It did not. Although some legal questions are unclear, there is no reasonable dispute that the kickbacks Omnicare was receiving were illegal. Nor do petitioners contest that the lawfulness of the millions they received in kickbacks was material to investors. They insist instead that investors have no right to complain that the registration statement was misleading, no matter how baseless or irresponsible the opinions it expressed, so long as petitioners actually believed their own meritless claims. *See* Petr. Br. 18-19 n.4.

Specifically, petitioners assert, as a categorical matter, that a statement of opinion can never be false or misleading under any provision of the federal securities laws – including but not limited to Section 11 – unless the speaker subjectively disbelieves what he is saying.[9] Under that view, so long as a defendant prefaces a false or misleading statement with the words "we believe," it avoids the strict liability Congress chose to impose under Section 11.

Petitioners' argument is as wrong as it is broad: as a matter of text, logic, and legal tradition, a genuinely held statement of opinion can be misleading with respect to (1) its subject matter and/or (2) its implication that the speaker has a reasonable basis for his views, which is not seriously undermined by undisclosed facts. Applying that traditional understanding is particularly appropriate in the context of Section 11's protection against misleading registration statements, which are prepared with

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[9] *See United States v. Wells*, 519 U.S. 482, 505 & nn.8-9 (1997) (Stevens, J., dissenting) (noting that "at least 100 federal false statement statutes may be found in the United States Code" and collecting citations).

great deliberation and to be relied upon by investors. As a consequence, a Section 11 plaintiff need only show that an issuer's opinion was objectively wrong at the time it was made or, at most, that it lacked a reasonable basis.

I. A Statement Of Opinion May Be Misleading, And Thus Actionable Under Section 11, If It Is Disbelieved, Objectively Wrong, Or Lacks A Reasonable Basis.

A. Petitioners' Argument Is Founded On Two False Premises.

Petitioners' argument is erected on the unsound foundation of two false premises: that Section 11's text always requires an "untrue statement of material fact," and that "[t]he only 'fact' conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief." Petr. Br. 11. From this they say it "naturally follows that such a statement can be 'untrue' as to a 'material fact' only if the speaker did not actually hold the stated belief." *Id.* at 11, 14. Both premises of the syllogism are incorrect.

First, petitioners ignore that Section 11's text prohibits not only "untrue," but also "misleading," statements and omissions. *See* 15 U.S.C. § 77k(a) (imposing liability if registration statement "contained an *untrue* statement of a material fact, *or* omitted to state a material fact . . . necessary to make the statements therein not *misleading*") (emphasis added).

Second, a statement of opinion can *mislead* investors not only about the psychological state of the speaker, but also about the subject matter of the opinion and its basis. Indeed, this Court made that clear in the principal case upon which petitioners rely. In *Virginia Bankshares*, corporate directors asserted in a proxy solicitation that they had approved a merger because they believed that the price offered for minority shareholders' stock was "high" and "fair." 501 U.S. at 1088. In a unanimous decision, this Court explained that such statements, while undoubtedly "statements of reasons or belief," were nonetheless "factual in *two* senses." *Id.* at 1092 (emphasis added). First, they were factual in the sense petitioners emphasize: they were "statements that the directors do act for the reasons given or hold the belief stated." *Id.* Second, they were factual in the sense petitioners claim is impossible: as "statements about the subject matter of the reason or belief expressed" – *i.e.*, "whether $42 was 'high,' and the proposal 'fair'" under the circumstances. *Id.* at 1092, 1094.

Petitioners' contrary assertion – that a statement of opinion conveys only the fact of subjective belief – fails the test of simple logic and is incompatible with over a century of legal tradition in a broad range of contexts. As explained below, expressing even a genuine opinion that something is true, when it is not, can be seriously misleading in two ways.

B. Statements Of Opinion That Are Objectively Incorrect Can Be Misleading As To Their Subject Matter Even If Subjectively Believed.

First, an incorrect statement of opinion may be misleading with respect to its *subject matter*. That is, saying "we believe X is true" has the tendency to persuade the listener that X is in fact true, not just that the speaker believes it to be true. If X is not true, the statement of opinion can be misleading, even if genuinely held.

For example, the statement "we believe we have 10,000 pounds of tomatoes on hand for sale" would naturally mislead listeners regarding the amount of the speaker's inventory if, in fact, there were only 5,000 pounds in the warehouse. That misleading effect would exist even if the speaker genuinely believed what he said. In the language of Section 11, the speaker would have "omitted to state a material fact . . . necessary to make the statements therein not misleading," 15 U.S.C. § 77k(a), namely, that there are only 5,000 pounds of marketable tomatoes.

It thus is no answer to argue that "an opinion is not a 'fact.'" Petr. Br. 15. An opinion may mislead listeners regarding matters that are indisputably factual (like the size of the company's inventory).

The same would be true of any number of statements of opinion: "We believe we have a final contract with the Government to supply the Army with boots"; "We believe we have a working prototype"; "We believe that our car gets more miles per gallon than any other production vehicle sold in America"; "We believe that none of our employees is

paying bribes to obtain government contracts." Although cast as opinions, they lead the listener to a reasonable understanding about underlying facts (the probable existence of a signed contract or working prototype, the extent of a vehicle's gas efficiency, or the non-existence of bribes) that may or may not be true. And if the opinion is likely to lead listeners to a *counterfactual* understanding of those matters, any normal speaker of English would say that the statement of opinion was misleading.

This Court's decisions are in accord. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), for example, Chief Justice Rehnquist explained that the statement "'In my opinion John Jones is a liar' . . . implies a knowledge of facts which would lead to the conclusion that Jones told an untruth." *Id.* at 18. And "if those facts are either incorrect or incomplete, or if the speaker's assessment of them is erroneous, the statement may still imply a false assertion of fact," even if the opinion is genuinely held. *Id.* at 19. "Simply couching such statements in terms of opinion does not dispel th[e] implication[]" that Jones is, in fact, a liar. *Id.* Precisely because the listener may be misled into thinking that Jones is a liar, "the statement 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement 'Jones is a liar.'"[10] And this is true whether or not the speaker subjectively believed that Jones is in fact a liar.

Indeed, in the very case petitioners say establishes their rule, *Virginia Bankshares*, this Court explained

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[10] *Id.*; *see* Restatement (First) Torts §567 & cmt. a (1938) ("A defamatory communication may consist of a statement of opinion upon undisclosed facts. . . . Thus, to call a man a thief implies the commission of some act or acts of thievery.").

that the directors' statements of opinion regarding the fairness of a stock offer could be proven "misleading about its subject matter *and* a false expression of the director's reasons." 501 U.S. at 1094 (emphasis added). Proving that the statements were misleading as to their subject matter, the Court explained, did not turn on the directors' state of mind, but rather "depended on whether provable facts about the Bank's assets, and about actual and potential levels of operation, substantiated a value that was above, below, or more or less at the $42 figure, when assessed in accordance with recognized methods of valuation." *Id.* at 1094. If, in light of those considerations, the stock offer was not high as an objective matter, then claiming to believe that the price was high would be misleading.

2. The same principle applies to legal opinions.[11] Incorrect legal-compliance opinions do not simply risk misleading investors about the content of the law. They also can mislead investors with respect to the company's underlying conduct.

For example, a company that stated an opinion that its sales practices were lawful could mislead investors into believing that the company was not engaged in illegal practices if, in fact, the company was obtaining many of its contracts with foreign governments through bribes, in violation of the

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[11] *See* Restatement (First) Torts §545(2) cmt. c on Subsection(1) ("[I]f a representation concerns the legal effect of facts not disclosed or not otherwise known to the recipient, it may justifiably be interpreted as implying that there are facts which substantiate the statement (see § 539)."); *see, e.g.*, *Hoyt Properties, Inc. v. Prod. Resource Grp.*, 736 N.W.2d 313, 318 (Minn. 2007); *Miller v. Osterlund*, 191 N.W. 919, 919 (Minn. 1923).

Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1(a). Because paying such bribes is plainly illegal, when a company says (incorrectly) that it believes its sales force is obeying the law, investors are likely to be misled into believing that the company is not generating a major portion of its business by paying bribes. That misleading effect would arise even if the issuer's top brass had not yet discovered that their deputies were securing many of the company's most significant contracts via under-the-table payments.

The statement would be equally liable to mislead investors about the factual details of the business's practices if the company knew its staff was paying bribes but had an undisclosed meritless (though genuinely believed) theory that the FCPA was unconstitutional.

3. To say that a statement of opinion *may* be actionably false or misleading, even if subjectively believed, does not mean that every incorrect or unfounded statement of opinion produces liability.

To start with, not every opinion has the capacity to be materially misleading. Some statements of opinion address matters of judgment that cannot be proven right or wrong. A beverage company's assertion "We believe our product compares favorably with Coca Cola," is unlikely to mislead because the subject matter of the opinion relates to a matter of personal taste not ordinarily susceptible of being proven true or false. *See* Restatement (Second) Contracts § 168 cmt. b; *Milkovich*, 497 U.S. at 20 (noting that the statement "'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,'" may convey no

provably true or false fact other than that the speaker holds those views).

Moreover, whether any particular statement (of opinion or otherwise) is misleading depends on context and content. An opinion offered in casual conversation will be understood differently than an opinion offered in return for compensation, or one included in a securities offering's registration statement and prospectus.[12] In addition, some statements couched as opinions may convey sufficient uncertainty to permit more leeway before they could be deemed misleading. A statement might, for example, clearly indicate that it is only tentative, and it might include qualifying considerations by identifying the salient countervailing factors that investors need to know in order to evaluate and appropriately discount the opinion's reliability. *See Virginia Bankshares*, 501 U.S. at 1097.

Often, an incorrect opinion can be rendered non-misleading simply by fully disclosing its underlying basis. *See, e.g.*, Restatement (Second) Torts § 539(1) (1977). In this case Omnicare might have avoided giving investors a misleading impression of the nature of the payments it was receiving from drug companies by disclosing the relevant terms of its contracts and its theory about why those payments were lawful.

Moreover, to conclude that a statement of opinion is false or misleading is not always sufficient to establish liability under the securities laws – or

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[12] For that reason, the Court's decision in this case need not necessarily control the treatment of false or misleading statements in other contexts, such as investor conference calls. *See* Wash. Leg. Found. Br. 10-11.

otherwise. Some provisions, like Section 10(b), require proof of scienter, which effectively requires showing that the defendant knew his statement was misleading. Section 11 does not require scienter, but does provide most defendants an affirmative defense if they genuinely and reasonably believed their opinions were true and exercised due diligence in forming them. And Congress has provided a special safe-harbor defense for forward-looking statements, encompassing many opinions – and subjecting only those covered by the safe harbor to a subjective-disbelief "actual knowledge" standard. 15 U.S.C. § 77z-2; *see infra* § III.B., at 53-54.

The point here is simply that statements of opinion are not *categorically* incapable of being misleading unless disbelieved; in appropriate circumstances, they may be misleading because they are incorrect.

4. In this case's present posture, petitioners do not contest respondents' allegation that their legal-compliance opinion was objectively wrong – Omnicare's contracts with drug companies plainly violated the federal anti-kickback statute, among other laws.[13] That objectively erroneous opinion was also misleading. Its natural effect was to lead investors to the mistaken belief that Omnicare's practices were lawful. Moreover, because investors would understand that accepting kickbacks would violate federal law (the registration statement said as much, *see* J.A. 94-95), the legal-compliance opinion was factually misleading because it was reasonably

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[13] *See* Petr. Br. 18-19 n.4 ("as this case comes to the Court, it is undisputed that the stated belief must be objectively erroneous in order to give rise to liability, and the only issue in dispute is whether, in addition, the stated belief must not have been actually held").

understood to imply that the company was not receiving payments to promote particular drugs.

C. Incorrect Statements Of Opinion Can Falsely Imply That The Speaker Has A Reasonable Basis For His Views.

As the United States argues, even if honestly held, statements of opinion also may falsely or misleadingly imply that the speaker both has a reasonable basis for his views and is not aware of any undisclosed facts incompatible with his opinion. *See* U.S. Br. 11-12.

1. In *Virginia Bankshares*, for instance, the Court explained that directors' statements that they believe a stock price to be "high" and "fair" are "reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." 501 U.S. at 1093. Accordingly, if the objective facts about a company's finances and operations justified a price much higher than the one the directors believed "fair" or "high," then the factual implications of their statements would be false or misleading, regardless of whether the opinion was genuinely (if irresponsibly) held. *Id.* at 1094.

The common law is in accord. It is true, as Lord Bowen once famously remarked, that "'the state of a man's mind is as much a fact as the state of his digestion.'" Petr. Br. 21 (quoting *Edgington v. Fitzmaurice*, (C.A. 1885) 29 Ch.D. 459, 483). [14] More pertinent here, though, is Lord Bowen's holding, in another prominent opinion, that in business

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[14] The quote is from Lord Bowen, not Lord Cotton. *Contra* Petr. Br. 21.

transactions if "the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion." *Smith v. Land and House Prop. Corp.*, (C.A. 1884) 28 Ch. D. 7, 15.

Lord Bowen's holding on this point is well-established in the American common law.[15] The Restatement (Second) Contracts explains that a "statement of opinion is also a statement of fact" not only that the speaker "has a particular state of mind concerning the matter to which his opinion relates," but also that the speaker "knows of no facts incompatible with the belief or that he knows of facts that justify him in holding it." Restatement (Second) Contracts § 168 & cmt. a (1979). For example:

> A, who is knowledgeable in financial matters, seeking to induce B, who is also knowledgeable in such matters, to make a contract to buy A's shares of stock in C Corporation, tells B that within five years the shares will pay dividends that will amount to the purchase price of the

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[15] *See, e.g.*, Restatement (Second) Torts § 539 cmt. a on Subsection (1) (1977); Restatement (First) Torts § 539 cmt. a on Subsection (1) (1938); Fowler V. Harper & Mary Coate McNeely, *A Synthesis of the Law of Misrepresentation*, 22 Minn. L. Rev. 939, 951 & n.26 (1938); 1 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* 562 (1956); *Shepherd v. Kendrick*, 181 So. 782, 784 (Ala. 1938); *Haserot v. Keller*, 228 P. 383, 388 (Cal. App. 1924); *Eastern States Petr. Co. v. Universal Oil. Prod. Co.*, 3 A.2d 768, 776 (Del. Ch. 1939); *Fox v. Cosgriff*, 159 P.2d 224, 228 (Idaho 1945); *Pound v. Clum*, 170 N.W. 41, 42-43 (Mich. 1918); *McDonald v. Smith*, 102 N.W. 668, 672 (Mich. 1905); *Whitehurst v. Life Ins. Co.*, 62 S.E. 1067, 1068 (N.C. 1908).

> stock. Neither A nor B has information about the finances of C, which is, in fact, hopelessly insolvent.

Id. § 168 illus. 6. On petitioners' view, because A did not know that his opinion was wrong, he cannot have misled B – the only fact conveyed by his opinion was that A held it, and that was true. But the Restatement explains that the law is otherwise:

> B interprets A's statement of opinion as an assertion that A knows facts sufficient to justify him in forming that opinion and is induced by this assertion to make the contract. B's interpretation is reasonable, the assertion is a fraudulent misrepresentation, and the contract is voidable by B.

Id.

The Restatement (Second) Torts gives another example from the securities context that is flatly incompatible with petitioners' basic premise:

> [W]hen an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that his examination has been sufficient to permit him to form an honest opinion and that what he has found justifies his conclusion. The opinion thus becomes in effect a short summary of those facts. When he is reasonably understood as conveying such a statement, he is subject to liability if he has not made the examination, or if

> he has not found facts that justify the opinion, on the basis of his misrepresentation of the implied facts.

Restatement (Second) Torts § 539 cmt. b on Subsection (1) (1976).[16]

Following this tradition, until very recently the federal securities precedents similarly regarded it as well-settled that "[a]n opinion or projection, like any other representation, will be deemed untrue for purposes of the federal securities laws if it is issued without reasonable genuine belief or if it has no basis."[17]

2. Again, the same rules apply to opinions of law.[18] Investors will understand a legal-compliance opinion

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[16] The same principles are applied with respect to a number of torts. *See* Restatement (Second) Torts §§ 538A (tort of misrepresentation), 539 & cmts. a-b (same); 542 cmt. b (same); 566 & cmt. b (defamation); 623A & cmt. e (injurious falsehood); *see also* Restatement (Third) of Unfair Competition § 3 cmt. d & illus. 9 (unfair competition) (1995).

[17] *Herskowitz v. Nutri/Sys., Inc.*, 857 F.2d 179, 184 (3d Cir. 1988); *see, e.g., Franklin Sav. Bank v. Levy*, 551 F.2d 521, 527 (2d Cir. 1977) ("where a broker-dealer makes a representation as to the quality of the security he sells, he impliedly represents that he has an adequate basis in fact for the opinion he renders," and if he "failed to exercise reasonable professional care in assembling and evaluating" the salient data, then his statement of opinion "was untrue in fact and misleading no matter how honestly but mistakenly held"); *accord Alton Box Board Co. v. Goldman, Sachs & Co.*, 560 F.2d 916, 922-23 (8th Cir. 1977).

[18] *See* Restatement (Second) Torts § 545(1) ("If a misrepresentation as to a matter of law includes, expressly or by implication, a misrepresentation of fact, the recipient is justified in relying upon the misrepresentation of fact to the same extent as though it were any other misrepresentation of fact."); *see also*

to imply that the company conducted a reasonable investigation into the law and the facts, and exercised reasonable legal judgment. This Court applied a similar insight in *Virginia Bankshares*, in which it held that a director's opinion that a proffered stock price was "high" should be assessed "in accordance with recognized methods of valuation." 501 U.S. at 1094. An opinion regarding value, like a legal opinion, often requires an exercise of judgment. But listeners expect that such opinions will be based on methods of analysis that are recognized as reasonable in the field.

In addition, the *factual* implications of a legal claim necessarily depend on the listener's reasonable understandings about the law. Unless told otherwise, investors will assume, for example, that when a company says it believes its sales practices are legal, it is not obtaining contracts by bribing foreign officials, because they will reasonably assume that the FCPA prohibits that conduct.

3. In this case, in addition to pleading that Omnicare's legal-compliance opinion was wrong, the Complaint alleged that none of the defendants had "made a reasonable investigation or possessed reasonable grounds" to believe that the challenged statements were truthful or complete. Complaint ¶¶ 179, 183. Petitioners have not challenged that allegation in this Court. Nor could they. Even if Omnicare had some novel theory about why the kickbacks were lawful, its statements were misleading in failing to disclose to investors facts that would contradict its opinion: namely, the fact that

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Restatement (First) Torts § 545(1) (same); Restatement (Second) Contracts § 170 (same).

Omnicare was contracting to receive payments for promoting specific medications. *See* Restatement (First) Torts §§ 539(1) & cmt. a on Subsection (1), 552 & cmt. b; Restatement (Second) Torts §§ 539(1)(a), 552 & cmt. b; Restatement (Second) Contracts § 168(2)(a). Had Omnicare made that disclosure, and explained the basis of any theory it had why those payments were legal, investors could have judged for themselves the riskiness of their investment in a company engaged in such practices.

D. The Common Law's Treatment Of Statements Of Opinion Supports Section 11 Liability For Misleading Statements Of Opinion, Even If Subjectively Believed.

As just shown, the common law has long rejected petitioners' basic premise that a statement of opinion conveys only the fact of the speaker's belief. Petitioners insist, however, that "honest but ultimately erroneous statements of opinion are typically not actionable as false statements of fact under the common law of misrepresentation." Petr. Br. 22. But that claim is misleading.

1. Honest opinions generally are not actionable as common-law fraud because the tort requires proof of scienter, which is obviously absent if a statement is honestly believed. *See, e.g.*, Restatement (Second) Torts § 528; W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 107, at 741-45 (5th ed. 1984). But the "antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud." *Huddleston*, 459 U.S. at 388-89. Instead of requiring plaintiffs to prove scienter, Section 11 imposes strict prima facie liability, subject to an

affirmative "due diligence" defense for some defendants. *Id.* at 382.

Some common-law decisions are premised, moreover, on the idea that "where the facts are equally known to both parties," each stands on an equal footing, and being fully informed may freely form his own opinion – so that the other's "is of no consequence." *Smith, supra*, 28 Ch. D at 15 (Bowen, L.J.). In such cases "[i]t is more correct to say . . . that a statement of opinion is a representation of a fact, but of an immaterial fact, on which the law will not permit the opposing party to rely. When, for any reason, such reliance is regarded as reasonable and permissible, a misstatement of opinion may be a sufficient basis for relief." William Prosser, *Law of Torts*, § 89, at 754 (1st ed. 1941); *accord* Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 109, at 755.

Without doubt, the common-law requirement of justifiable reliance sometimes limited liability for opinions by circumscribing the situations in which a listener could reasonably rely on a statement of opinion, often under the doctrine of *caveat emptor*. *See* U.S. Br. 21 (collecting cites). Yet a "fundamental purpose" of federal securities law is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963); *accord Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972); *Santa Fe Indus. v. Green*, 430 U.S. 462, 476-77 (1977). And Section 11 specifically departs from the common law by eliminating the requirement of proving justifiable reliance, on the premise that investors are entitled to trust what the registration statement says. *See Huddleston*, 459 U.S. at 382; 2

Thomas Lee Hazen, The Law of Securities Regulation § 7.3[4], at 220-21 (6th ed. 2009).

2. Petitioners' description of the common law also fails to account for distinctions that, when considered in the context governed by Section 11, render liability for misleading statements of opinion entirely unremarkable.

Section 11's closest common-law analog is the contract-law right of rescission for contracts induced by innocent misrepresentation. *See* Restatement (Second) Contracts § 164(1); *see also id.* § 168 illus. 6 (applying rule to contract to purchase securities); 15 U.S.C. § 77k(a) (providing cause of action for misrepresentations in registration statement, a document used to induce purchase of securities); *id.* § 77k(e) (providing rescission-like remedies).

At common law, a party induced to enter a contract by a "material misrepresentation by the other party" may void the contract. Restatement (Second) Contracts § 164(1). Like Section 11, and in contrast with the general rule of common-law fraud, this contract-law principle does not require proof of fraudulent intent. *See id.* cmt. b; *see also, e.g.*, 3 Samuel Williston, *The Law of Contracts* § 1500, at 2668 (1920); Prosser, *Law of Torts*, § 89, at 755-56; *Chandler v. Satchell*, 168 S.E. 744, 748 (Va. 1933); *Grim v. Byrd*, 73 Va. 293, 300-03 (1879). It is enough that the statement constituted a "material misrepresentation . . . upon which the recipient is justified in relying." Restatement (Second) Contracts § 164(1).

As discussed, a party generally may justifiably rely on an opinion's factual implications. *Id.* § 168(2). In addition, a party may justifiably rely on a "pure" statement of opinion, when he (a) "stands in such a

relation of trust and confidence to the person whose opinion is asserted that the recipient is reasonable in relying on it" or (b) "reasonably believes that, as compared to himself, the person whose opinion is asserted has special skill, judgment or objectivity with respect to the subject matter." Restatement (Second) Contracts § 169. In crafting Section 11, Congress intended to treat issuers, officers, and experts as having fiduciary-like obligations to investors with respect to the content of registration statements. *See* 15 U.S.C. § 77k(c) (1933) (as originally enacted, providing that in applying Section 11 affirmative defenses, "the standard of reasonableness shall be that required of a person occupying a fiduciary relationship"); H.R. Rep. No. 85 at 9 (explaining that the "responsibility thus imposed" under Sections 11 and 12 "is no more or less than that of a trust").[19]

Against this backdrop, the fairest conclusion is that Congress intended that investors should be entitled to rely on the statements of opinion offered in the special context of registration statements, given the fiduciary-like expectations for the issuer. Nor is it surprising that Congress would provide investors rescission-like remedies when those opinions, though genuinely believed, are objectively erroneous or lack a reasonable foundation; the right of rescission for innocent misrepresentations has long existed at common law. *See, e.g.*, *Chandler*, 168 S.E. at 748.

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[19] Congress subsequently amended this language to refer to a "prudent man" standard, but that amendment was simply intended to "remove[] possible uncertainties as to the standard of reasonableness by substituting for the [original] language the accepted common law definition of the duty of a fiduciary." H.R. Rep. No. 1838, at 41.

In addition, the liability of non-issuers, like auditors, is similar to what already existed at common law for experts paid for their opinions. At common law, one "who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions" is subject to liability "if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) Torts § 552(1); *accord* Restatement (First) Torts § 552(a). This rule "applies not only to information given as to the existence of facts but also to an opinion given upon facts equally well known to both the supplier and the recipient." *Id.* § 552 cmt. b. The quintessential example is an audit opinion.[20] Section 11 approximates these

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[20] Restatement (Second) Torts § 552 illus. 14-15. Despite some restrictions on who may sue, *see id.* § 552(2), auditors have long been held liable for negligent audit opinions. *See Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 114-15 (N.Y. 1985) (applying *Ultramares Corp. v. Touche*, 174 N.E. 441, 442 (N.Y. 1931) (Cardozo, J.) (defining class of potential plaintiffs where accountants negligently certified that a corporation's financial statement "in our opinion, presents a true and correct view of the financial condition of Fred Stern & Co., Inc.," and recovery was sought "for misrepresentations that were merely negligent"); *see also, e.g., Touche Ross & Co. v. Comm. Union Ins. Co.*, 514 So. 2d 315, 322 (Miss. 1987); *White v. Guarente*, 372 N.E.2d 315, 319-20 (N.Y. 1977); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873, 874-80 (Tex. Civ. App. 1971); *see also Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP*, 542 F.3d 475, 481-84 (5th Cir. 2008) (Mississippi law); *Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs*, 455 F.2d 847, 851-52 (4th Cir. 1972) (Rhode Island law); *Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85, 91-93 (D.R.I. 1968) (Rhode Island law); *Fullmer v. Wohlfeiler & Beck*, 905 F.2d 1394, 1395-96 (10th Cir. 1990) (Utah law).

standards by providing auditors and other non-issuer defendants with a due-diligence defense that effectively subjects them to liability only if negligent. *See Hochfelder*, 425 U.S. at 208.

E. Subjecting Defendants To Section 11 Claims For False Or Misleading Statements Of Opinion Without Proof Of Disbelief Is Consistent With The Statute's Purposes.

Acknowledging the possibility of Section 11 liability for some good-faith, but nonetheless erroneous and misleading opinions is entirely consistent with the statute's purposes.

Section 11 applies a particularly rigorous standard of liability in the uniquely important context of registration statements. Congress intended registration statements to be prepared with particular care, vetted by the issuer, its lawyers, and its underwriters, and reviewed in relevant part by expert independent auditors, prior to filing with the SEC. Congress intended Section 11 to assure investors that they can place unreserved confidence in the accuracy of the information conveyed in registration statements, thereby creating an efficient market environment that benefits investors and issuers alike.

Section 11 is premised on the view that in this context, it is fair and reasonable to put the risk of error in a registration statement on the shoulders of those responsible for what it says, and on the company that stands to financially benefit from investors' misunderstanding of material facts relating to the company or its securities. *See, e.g.*, S. Rep. No.

47, 73d Cong., 1st Sess., at 4-5 (1933); H.R. Rep. No. 85, at 9-10. While individuals may avoid liability by showing good faith and due diligence, Congress determined that issuers ultimately should bear the risk of misleading error, at least to the extent of giving investors their money back, even when the error is unintentional.

In light of this rationale and these purposes, there is no reason to treat erroneous opinions as fundamentally different from any other false or misleading statement. Because the purpose of Section 11 is not to punish wrongful conduct, but to provide full disclosure and apportion risk of error, the fact that an erroneous opinion is genuinely believed does not distinguish it from any other mistakenly false or misleading statement. As discussed, a genuinely believed, but erroneous, opinion can mislead, and do as much damage to investors, as any other false statement. Giving issuers virtual immunity from strict liability for misleading statements, so long as they preface their claims with "we believe," would unravel the carefully crafted apportionment of risk and responsibility that Congress established in Section 11.

II. Petitioners' Objections Are Unfounded.

Petitioners' various objections to applying Section 11 to genuinely believed statements of opinion are unfounded.

A. *Virginia Bankshares* Did Not Hold That Statements Of Opinion Must Be Disbelieved In Order To Be False Or Misleading.

Petitioners argue *Virginia Bankshares Inc. v. Sandberg*, 501 U.S. 1083, 1093 (1991), holds that an opinion cannot be false or misleading unless the defendant subjectively disbelieved what he said. Not so. *See* U.S. Br. 16-21.

In *Virginia Bankshares*, the Court considered, in relevant part, "whether a statement couched in conclusory or qualitative terms purporting to explain directors' reasons for recommending certain corporate action can be materially misleading within the meaning of Rule 14a-9" and subject to suit under the "implied private right of action for the breach of § 14(a)" of the 1934 Act. 501 U.S. at 1087. The Court took the case on the understanding that the jury had found "that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, *and we confine our discussion to the statements so made.*" *Id.* at 1090 (emphasis added). In the footnote that immediately followed, the Court explained that it therefore resolved the case on the assumption that "scienter was necessary for liability generally under § 14(a)." *Id.* at 1090 n.5.

The Court thus had no occasion to consider the question presented here: whether liability will lie under a statute that does *not* require scienter, when the defendants perhaps *did* believe the objectively erroneous opinions that they expressed but for which they had no reasonable basis.

Petitioners nonetheless point to certain sentences in the opinion that they say adopted a categorical rule that applies to every false statement of opinion under any conceivable statute. But those sentences cannot bear the weight petitioners place on them.

Petitioners point to the Court's statement that it interpreted "the jury['s] verdict as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions" because "such a statement by definition purports to express what is consciously on the speaker's mind." *Id.* at 1090. That inference was perfectly reasonable in the case before the Court, given that the plaintiff had "alleged, among other things, that the directors had not believed" the opinions they expressed, *id.* at 1088, and that the jury was "instructed to consider whether [the directors'] statement 'was false or misleading, *because* the claimed high values for the shares *was not the reason* for [the board's] approval.'"[21] Given this Court's assumption that scienter was required, *Virginia Bankshares*, 501 U.S. at 1090 n.5, it had no reason to give any substantial thought to the broader epistemological claim (not made in the case) that a statement of opinion can *never* be false or misleading so long as subjectively believed.

Petitioners also misconstrue the Court's observation that a "statement of belief may be open to objection . . . solely as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095; *see* Petr. Br. 18. Again, the Court was not asserting that a statement of belief or opinion

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[21] Brief for the SEC & FDIC, at 34 n.25, *Virginia Bankshares, Inc. v. Sandberg*, No. 89-1448 (emphasis added).

can be misleading *only* if it misstates the speaker's actual belief. Rather, the Court was simply noting the possibility that a litigant might object to a statement of opinion solely on the basis of the defendant's subjective disbelief without asserting that the substance of the opinion was misleading in any other respect. That possibility gave rise to the question "whether disbelief, or undisclosed belief or motivation, standing alone, should be a sufficient basis to sustain an action under § 14(a), absent proof by the sort of objective evidence described above that the statement also expressly or impliedly asserted something false or misleading about its subject matter." *Virginia Bankshares*, 501 U.S. at 1095-96. As discussed, the Court's resolution of that question – holding that a subjectively disbelieved statement of opinion is actionable under Section 14 only if it is also "false or misleading in what the statement expressly or impliedly declared about its subject," *id.* at 1096 – is irreconcilable with petitioners' basic premise that statements of opinion convey only facts about the speaker's mind, not the opinion's subject matter.

Finally, petitioners cite a sentence in Justice Scalia's concurrence, in which he read the majority opinion to preclude Section 14 liability "if in fact [the stock at issue] was not a high value but the directors honestly believed otherwise." *Id.* at 1109. No other Justice joined the concurrence, and Justice Scalia did not say that he read the opinion to so hold because the Court had adopted the implausible conclusion that a statement of opinion can be misleading only if disbelieved. It is just as likely that Justice Scalia, like the majority, was operating on the assumption that Section 14(a) requires scienter, which in itself would preclude liability unless the directors intended to deceive. *See id.* at 1090 & n.5. Or, perhaps he

believed that intent to deceive should be required in order to narrow "the federal cause of action . . . never enacted by Congress." *Id.* at 1110. Either way, his reasoning would not apply to the strict-liability express right of action embodied in Section 11.

B. Applying Section 11 To Genuinely Believed, But Incorrect, Opinions Does Not Authorize Liability By Hindsight.

Petitioners are also wrong to insist that accepting respondents' position would subject companies to Section 11 liability based on "hindsight" and "later events that were unknowable to the issuer at the time." Petr. Br. 32. Petitioners' argument ignores that many statements of opinion (including the ones alleged in this case) express views about present or past events, like the nature of a company's present contracts, the contents of its bank accounts, or its sales and other financial performance data from the past year. Petitioners offer no reason why Congress would have intended to hold a company strictly liable for accidently misstating last year's profits, but provide it absolute immunity so long as it prefaced the same statement with the words "we believe."

It is therefore no accident that petitioners focus on opinions regarding future events and other kinds of predictions. It is also no help, for Congress has already provided defendants significant protection from liability by "hindsight" for opinions about future events.

First, every defendant except the issuer is entitled to the due-diligence defense that precludes liability so long as the defendant, after a reasonable

investigation, had reasonable grounds to believe his opinion was correct, even if it turned out to be wrong. *See* 15 U.S.C. § 77k(b)(3).

To be sure, issuers themselves have no such defense. But Congress has expressly dealt with their concerns as well, not by requiring proof of subjective disbelief in all opinion cases, but instead with a 1995 amendment to the 1933 Act providing a safe harbor for "forward-looking statements" expressing opinions about the future, such as revenue projections, sales objectives, economic forecasts, and product plans. *See* 15 U.S.C. § 77z-2; *id.* § 77z-2(i)(1). Issuers can avoid liability for covered forward-looking statements if their statements were not made with "actual knowledge . . . that the statement was false or misleading." *Id.* § 77z-2(c)(1)(B). That is effectively the protection petitioners seek here, but Congress chose to limit it to forward-looking statements, not the statements concerning past or present conduct (like the legal compliance statements at issue in this case), and only if the statements meet certain criteria. *See infra* § III.B., at 53-54.

If defendants consider these collective protections insufficient, they remain free to seek more from Congress, which has shown itself particularly attentive to such concerns in this area. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014).

C. A Statement Of Opinion Can Be False Or Misleading Even If It Involves An Exercise Of Judgment.

Petitioners insist that it makes no sense to hold issuers liable for incorrect opinions, particularly

regarding the lawfulness of their business practices, because statements "concerning legal compliance" are "necessarily infused with the issuer's judgment as to uncertain future events." Petr. Br. 32-34. Notably, petitioners do not ask for a special rule limited to legal opinions, or to opinions that involve exercises of judgment. But even if they did, the request would lack merit.

Petitioners are right in part. A statement must be false or misleading at the time it is made – that is, "when" it "became effective." *See* 15 U.S.C. § 77k(a). That means that a legal-compliance opinion is not rendered retrospectively misleading simply because a statute was amended, a regulation was invalidated, or a court decision overruled several years later.

But the fact that an opinion requires an exercise of judgment does not mean it is incapable of being false or misleading. In *Virginia Bankshares*, for example, this Court held that the question of whether a stock price is high or low, although indisputably one requiring an exercise of expert judgment, is a fact that can (and, in the context of a Section 14 claim, must) be proven false. 501 U.S. at 1093-94. The fact that the question involves judgment may lead to greater leeway before one would say that the valuation judgment was false or misleading. But a company's value is not unknowable.

Neither is the content of the law. Our legal system is premised on the presumption that the law is knowable to those who must obey it. And, indeed, while some issues of law may be unclear, many others are not. A company that said it believed it was complying with the law would plainly mislead investors if the company operated as little more than a Ponzi scheme, was obtaining contracts by bribing

government officials, or lying to evade taxes. Petitioners cannot seriously contest that Omnicare's statement of legal compliance would be at the very least misleading if its contracts with drug companies called for substituting placebos for penicillin or stealing medications from other companies' warehouses.

Of course, some legal questions are closer. But defendants do not claim that legal opinions can never be proven false. To the contrary, they seemingly insist that Section 11 *requires* a plaintiff to prove that a legal opinion was both false when given, *and also* disbelieved. Petr. Br. 18-19 n.4. Their complaint is that in some instances, legal mistakes are understandable, so that it is unfair ever to hold issuers responsible unless their statement of opinion was both incorrect and culpable because disbelieved. But, as discussed, the same could be said of many other misstatements (like the valuation of a stock in *Virginia Bankshares*). Congress determined that in the special context of registration statements, issuers generally should bear the risk of even reasonable mistakes.

Of course, defendants can avoid the prospect of liability by declining to venture legal opinions on substantially uncertain subjects. When they nonetheless offer an opinion, it is likely because they believe that the opinion will influence the views of potential investors, increase the amount they are willing to pay for the issuer's stock, thereby enriching the issuer. It is not unfair, unprecedented in the law, or contrary to Section 11's scheme to require issuers to bear some financial risk in return for that financial benefit. *See supra* § I.D., at 34-39.

That said, as noted earlier, defendants can guard against the potential to mislead by disclosing the underlying basis of an opinion they express, and the important qualifying or countervailing factors needed to evaluate the opinion's reliability. *See Virginia Bankshares*, 501 U.S. at 1097.

D. Applying Section 11 To False Or Misleading Statements Of Opinion Will Not Unduly Discourage Valuable Disclosures.

Petitioners complain that holding issuers liable for false statements of opinion will deter them from offering opinions, thereby making "less information, not more, available to investors." Petr. Br. 37. Not so. Issuers have powerful economic incentives to provide information that potential investors view as important to deciding whether to purchase an offered security. Indeed, by making clear that issuers can best avoid liability by fully disclosing the factual or legal basis of their opinions, *see supra* at 26-27, respondents' position is likely to produce *more* valuable information for investors, not less.

More information is only a good thing if it is truthful and reliable. The 1933 Act was enacted precisely because investors were getting too much false and misleading information, and because Congress recognized that issuers have enormous financial incentives to provide investors with information that will make their securities more attractive while withholding truthful information that would undermine the securities' price.

Thus, the fact that investors do indeed rely on issuers' statements of opinion, *see Virginia*

Bankshares, 501 U.S. at 1090-91, provides an important reason to reject petitioners' request for immunity for even grossly misleading opinions so long as they are genuinely held.

III. Petitioners' Contrary Rule Is Irreconcilable With The Text And Purposes Of Federal Securities Law.

Petitioners do not claim that their rule is justified by anything in particular about Section 11. To the contrary, petitioners take pains to emphasize that their argument would apply to any statute that prohibits false or misleading statements of fact. *See* Petr. Br. § C.1. They examine Section 11 only to argue that there is no basis in the provision's text or purposes to warrant a departure from ordinary principles governing false or misleading statements.

Because petitioners misunderstand the ordinary rule, their arguments regarding Section 11 in particular get them nowhere. In fact, petitioners' interpretation is *particularly* inapt for Section 11 and cannot be squared with its text, structure, or purposes. And petitioners' position would do damage to a number of important federal securities provisions that prohibit false or misleading statements.

A. Petitioners' Rule Conflicts With Section 11's Allocation Of Burdens And Defenses.

Petitioners' interpretation makes hash out of Section 11's careful calibration of the plaintiffs' prima facie case and the defendants' affirmative defenses.

Congress intended Section 11 to "throw[] upon originators of securities a duty of competence as well as innocence which the history of recent spectacular

failures overwhelmingly justifies." H.R. Rep. No. 85, at 9. The provision's central innovation was to relieve plaintiffs of the burden of proving intentional misconduct, providing strict liability for all false or misleading statements unless the *defendant* is eligible and able to prove: (a) that he conducted a "reasonable investigation"; (b) that he had "reasonable ground to believe"; and (c) that he "did believe" that the statements were true and not misleading. 15 U.S.C. § 77k(b)(3)(A).

Congress viewed this allocation of burdens as "indispensable to make the buyer's remedies under these sections practically effective." H.R. Rep. No. 85, at 9. The House Report explained that "[e]very lawyer knows that with all the facts in the control of the defendant it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of defendant." *Id.* Thus, "[u]nless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omissions or commission on those who purport to issue statements for the public's reliance." *Id.*[22]

On petitioners' view, however, so long as defendants preface their statements with "we believe," they cast the burden of proving knowledge of falsity on the plaintiff. Even worse, petitioners insist on "factual allegations and proof that the *speaker* of

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[22] The Conference Report adopted the standard of the House bill, with its due-diligence defense, which "measured liability . . . in terms of reasonable care, placing upon the defendants the duty, in case they were sued, of proving that they used reasonable care to assure the accuracy of these statements." H.R. Rep. No. 152, 73d Cong., 1st Sess. (Conf. Rep.) at 26 (1933); *see* 77 Cong. Rec. 3891, 3901 (May 22, 1933).

the statement (usually the issuer) did not hold the stated belief," Petr. Br. 30, never explaining exactly how a plaintiff would prove the subjective state of the issuing corporation, which has no actual mind or beliefs, as expressed in a document ordinarily developed through the collective action of many individuals.

Even more, on petitioners' theory defendants would evade entirely the requirement that the opinion be based on a reasonable investigation; an honestly (but irresponsibly) held opinion based merely on a hunch would be absolutely immune no matter how unreasonable and groundless.

That consequence is particularly anomalous because the statute expressly contemplates Section 11 suits against defendants who, as a practical matter, will *only* be sued on the basis of an opinion. For example, the statute requires the registration statement to include a balance sheet and a profit and loss statement, both of which must be "certified by an independent public or certified accountant." 15 U.S.C. § 77aa(25); *see also id.* § 77aa(26). As petitioners' *amici* explain, that certification constitutes "an opinion, based on professional judgment, on the issuer's financial statements." *Amicus* Br. Center for Audit Quality, at 1-2. Specifically, it constitutes "an opinion as to whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period." *Arthur Young & Co.*, 465 U.S. at 811 (footnotes omitted). Congress then expressly authorized suits against auditors, 15 U.S.C. § 77k(a)(4), but provided them (and similar experts) their own specific "due diligence" defense, *id.* § 77k(b)(3)(B). *See Hochfelder*, 425 U.S. at 208.

As petitioners' auditor *amici* point out with hopeful anticipation, on petitioners' view an auditor should never need to prove that defense. *Amicus* Br. Center for Audit Quality, at 15-16. Instead, it would be the *plaintiff's* burden to prove that the defendant disbelieved his own audit opinion. Moreover, the defense will never have a meaningful role to play, because in establishing a prima facie case, the plaintiffs will as a practical matter have defeated in advance any assertion of the affirmative defense by showing that the auditor did not "believe . . . that [his] statements therein were true," 15 U.S.C. § 77k(b)(3)(B).

Petitioners' interpretation thus does violence not only to the language and logic of the statute, but also to its effectiveness. The damage done in the audit context is emblematic. This Court has recognized that corporate "financial statements are one of the primary sources of information available to guide the decisions of the investing public." *Arthur Young & Co.*, 465 U.S. at 810. Requiring audit opinions was intended to provide investors with assurance that they can safely rely on those statements without having to undertake the massive investment of time and resources to verify for themselves the financial statements' accuracy. But audit opinions can serve that function only if investors can, in turn, have confidence in the "*competence* as well as innocence" of a firm's auditors. H.R. Rep. No. 85, at 9 (emphasis added). If petitioners' interpretation is accepted, all Section 11 would guarantee is that the opinion is subjectively believed, which is small comfort if the opinion is honest rubbish.

B. Petitioners' Rule Cannot Be Squared With The Safe-Harbor Defense For Forward-Looking Statements.

Petitioners' notion that statements of opinion cannot be deemed misleading unless subjectively disbelieved similarly conflicts with the "safe harbor" defense provided for forward-looking statements.

As noted, the safe-harbor provision excludes liability for certain kinds of "forward-looking statements," under certain conditions, *see* 15 U.S.C. § 77z-2, unless the forward-looking statement "was made with actual knowledge . . . that the statement was false or misleading." *Id.* § 77z-2(c)(1)(B)(i). But almost every forward-looking statement can be characterized as an opinion about the future. Under petitioners' view that no opinion is actionable for being false or misleading unless it is disbelieved, the safe-harbor "actual knowledge" defense merely replicates what the 1933 Act already required.

On the other hand, addition of the safe harbor in 1995 makes perfect sense if Congress believed that some 1933 Act provisions, like Section 11, subject issuers to liability for false or misleading statements of opinion (including forward-looking opinions) without proof that the defendant knew the statement of opinion was false or misleading.

Petitioners' view is also difficult to reconcile with the safe harbor's many limitations. The defense does not apply to every forward-looking statement, but instead has detailed exemptions and limitations regarding the kinds of defendants who can claim the defense and the kinds of statements that are protected. For example, the safe-harbor defense is

withheld from issuers that have been convicted of certain securities-related offenses, or have been found in violation of antifraud provisions of the securities laws, within the preceding three years. *See* 15 U.S.C. § 77z-2(b)(1)(A). But those same defendants *do* enjoy protection for their projections and forward-looking opinions if the Court accepts petitioners' position. Likewise, Congress expressly excluded from the safe-harbor defense statements made in financial statements, tender offers, and initial public offerings. *Id.* § 77z-2(b)(1)(A), (C), (D). Petitioners' interpretation effectively erases those limitations from the statute.

C. Petitioners' Rule Would Undermine Enforcement Of Other Important Securities Provisions.

The harm petitioners' rule would inflict is not limited to Section 11 private suits.

For example, if the SEC determines that a proposed registration statement includes a false or misleading statement, it is empowered to issue a "stop order" to delay the effectiveness of the registration statement until the problem is corrected. 15 U.S.C. § 77h(d). If petitioners' view is accepted, however, the SEC lacks the power to issue a stop order in response to a statement of opinion that is *clearly* incorrect and *exceedingly* likely to mislead investors without first determining whether the issuer disbelieves its opinion. Beyond imposing the additional administrative burden and cost, petitioners' rule would preclude the SEC from requiring any revision to the registration statement if, upon review, it determined that the grossly misleading statement of opinion was genuinely (if

irresponsibly) held. Relatedly, the Commission would lack the power to issue cease-and-desist orders to rectify any statement of opinion that was genuinely believed, regardless of how many investors were being misled or how unreasonable the issuer's beliefs. *See* 15 U.S.C. § 77h-1.

The same would be true of other provisions designed to protect investors from false and misleading statements, not just fraud. For example, in *Aaron v. SEC*, 446 U.S. 680 (1980), the SEC brought an enforcement action against a securities broker whose salesmen had been telling prospective investors that a lawn-care equipment manufacturer "was planning or in the process of manufacturing a new type of small car and tractor, and that the car would be marketed within six weeks," when that just was not true. *Id.* at 682. The SEC brought claims under Sections 17(a)(2) and (3), which prohibit a securities dealer from "obtain[ing] money or property by means of" an untrue or misleading statement, or engaging in a transaction that "would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(2), (3). The broker defended on the ground that the SEC had not proven that he knew that the statements his salesmen were making were false. But this Court held that the provision requires no proof of scienter and, accordingly, affirmed judgment against him. *Aaron*, 446 U.S. at 697.

On petitioners' view, so long as brokers cast their statements in terms of opinions – *e.g.*, that they *believe* the company is developing a particular product, and that in their *opinion* it is ready for market – they may avoid liability unless the SEC is able to prove that they subjectively disbelieved what they were saying. Indeed, it is arguable that on petitioners' view, *Aaron* was wrongly decided because the statement that the new car "would be marketed

within six weeks" might be viewed as a statement of opinion or projection about the future.

It is no answer that the SEC may explain to the issuer the unreasonableness of its opinion and then take action if it does not see the error of its ways. On petitioners' view, even *reckless* opinions are immunized because the only "fact" conveyed by a statement of opinion is that the issuer genuinely holds it. Petitioners' position would eliminate liability for genuinely held reckless statements under provisions requiring scienter, in contravention of the commonly accepted view that recklessness is sufficient to establish liability under provisions like Section 10(b).[23]

IV. This Court Should Affirm.

In light of the foregoing, this Court should affirm. In this Court, petitioners give only one reason why respondents' Complaint should be dismissed: they say that plaintiffs are required in every Section 11 case to plead that the defendants did not believe a challenged statement of opinion, which respondents did not do. Because that categorical assertion is wrong, the Court should simply affirm.

The United States (but not petitioners) urges the Court to vacate and remand because, it says, the court of appeals "erred in *suggesting* that a statement of opinion is actionably false whenever the stated

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[23] This Court has repeatedly held open the question of whether recklessness is enough to prove a Section 10(b) violation, while noting the lower court opinions holding that it is. *See Aaron*, 446 U.S. at 686 n.5; *Hochfelder*, 425 U.S. at 193 n.12; 4 Thomas Lee Hazen, *The Law of Securities Litigation* § 12.8[3], at 12-18 (6th ed., 2009).

opinion is ultimately found to be incorrect." U.S. Br. 14 (emphasis added). That recommendation lacks merit because, as argued above, a statement of opinion *can* be misleading because it is incorrect.[24]

Accepting the United States' position that a statement of opinion is actionable if it lacks a reasonable basis, moreover, there would be no basis for a remand. The United States seemingly agrees that the Sixth Circuit's *judgment* is correct – it does not dispute that the only relevant argument petitioners made below for dismissal was that respondents failed to plead subjective disbelief, and it agrees that the court of appeals "correctly held that a plaintiff need not allege subjective disbelief to recover under Section 11 for a statement of opinion." *Id.* at 10. Because "this Court reviews judgments, not opinions," the Government's dissatisfaction with the opinion the Sixth Circuit wrote in the course of reaching the correct judgment is not a basis for

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[24] In fact, the Sixth Circuit did not suggest (much less hold) that a "plaintiff need only allege that the opinion was 'objectively false.'" U.S. Br. 5. The passages to which the United States cites were responding to the district court's reliance on the Sixth Circuit's prior Section 10(b) precedents to hold that subjective disbelief was required under Section 11. The court of appeals explained that those precedents were inapplicable because their results were driven by the scienter requirement of Section 10(b), which is absent from Section 11. Pet. App. 13a-14a. In other words, because "§ 11 provides for strict liability and it was therefore inappropriate for the district court to require [respondents] to plead knowledge in connection with their § 11 claim." Pet. App. 11a. The question of what *else* the plaintiff must prove was simply not before the Sixth Circuit because the district court had not reached that question, petitioners having raised the absence of an allegation of disbelief as the sole relevant basis for dismissal.

reversal or vacatur. *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 842 (1984).

A remand to apply the United States' proposed rule is particularly unwarranted because it has no prospect of changing the result. The Complaint specifically alleges that none of the defendants had "made a reasonable investigation or possessed reasonable grounds" to believe that the challenged statements were truthful or complete. Complaint ¶¶ 179, 183. Even if allowed to controvert those allegations in a motion to dismiss, petitioners have made no attempt to do so. *See, e.g., Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 732 (2013) (rejecting Government's suggestion of remand in similar circumstances).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
GOLDSTEIN & RUSSELL, P.C.
5225 WISCONSIN AVE NW.
WASHINGTON, DC 20015

KEVIN L. MURPHY
GRAYDON HEAD & & RITCHEY LLP
2400 CHAMBER CENTER DRIVE, SUITE 300
FORT MITCHELL, KY 41017

DARREN J. ROBBINS
ERIC ALAN ISAACSON
(*COUNSEL OF RECORD*)
erici@rgrdlaw.com
HENRY ROSEN
JOSEPH D. DALEY
STEVEN F. HUBACHEK
AMANDA M. FRAME
SUSANNAH R. CONN
DAVID J. HARRIS, JR.
ROBBINS GELLER RUDMAN & DOWD LLP
655 WEST BROADWAY, SUITE 1900
SAN DIEGO, CA 92101
(619) 231-1058

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REPLY BRIEF

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In the Supreme Court of the United States

OMNICARE, INC., ET AL., PETITIONERS

v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

HARVEY KURZWEIL
RICHARD W. REINTHALER
JOHN E. SCHREIBER
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166

ANDREW C. NICHOLS
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
Counsel of Record
JOSEPH M. TERRY
JOHN S. WILLIAMS
SARAH K. CAMPBELL
A. JOSHUA PODOLL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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In the Supreme Court of the United States

No. 13-435

OMNICARE, INC., ET AL., PETITIONERS

v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

To read respondents' and the government's briefs, one could be forgiven for forgetting that this is a case about interpreting the language of a statute: the language in Section 11 of the Securities Act of 1933 that prohibits untrue "statement[s] of * * * material fact." That language, which appears in materially identical form in numerous provisions of the federal securities laws, has a plain meaning; indeed, this Court has already provided it. In *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), the Court held that a statement of opinion or belief is actionable "solely as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095. That is for the simple reason that the only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief.

The Sixth Circuit erred in this case when it refused to follow *Virginia Bankshares* in construing the language of Section 11.

Faced with the obvious flaws in the court of appeals' reasoning, respondents do not even attempt to defend it. Instead, they seek to transform the case from one about misstatements to one about omissions, under which a supposedly misleading statement of opinion can give rise to liability based on the omission of other statements. But that effort founders on the text of the statute and on this Court's reasoning in *Virginia Bankshares*. In Section 11, as in other provisions of the federal securities laws, Congress provided liability only for false or misleading statements of material fact. An opinion is not itself a fact. And a statement of opinion can be false or misleading only with respect to the fact expressed therein: the speaker's belief.

For its part, the government does not defend the Sixth Circuit's reasoning either. Instead, it offers still another alternative, under which a statement of opinion can be actionable if the speaker lacked a reasonable basis for the stated belief, even where the speaker actually held the belief. But that interpretation suffers from all of the same flaws as respondents' and would be hopelessly amorphous in its application besides. And while the government seeks deference for the SEC's "longstanding" practice of imposing liability under a "reasonable basis" standard, the government cites only the thinnest evidence of that purported practice. Because the government's interpretation, like respondents', cannot be reconciled with the plain language of Section 11, the Court should reject it and reverse the judgment below.

A. Like Other Provisions Of The Federal Securities Laws, Section 11 Imposes Liability Only For Untrue Or Misleading Statements Of Material Fact

Section 11 creates a private right of action in cases where a registration statement "contain[s] an untrue *statement of a material fact* or omit[s] to state a material fact * * * necessary to make the *statements therein* not misleading." 15 U.S.C. 77k(a) (emphases added). As with other provisions of the federal securities laws, therefore, Section 11 imposes liability not for a "statement of opinion," but rather for a "statement of a material fact." It is the "statement of a material fact" that must itself be untrue or misleading.

As petitioners have explained (Br. 14-16), the only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. As a result, the statement that the speaker held the stated belief can be untrue only if the speaker did not actually hold the belief. And such a statement can be misleading only insofar as it conveys the incorrect impression that the speaker held a particular belief.

1. Respondents and the government do not dispute that, as an uncertain or subjective assessment, an opinion is not itself a "fact." See Restatement (Second) of Torts § 538A (1977) (defining a statement of opinion). Yet each of their more expansive interpretations rests on the proposition that the word "opinion" can be substituted for "fact" in Section 11, such that an untrue or misleading *opinion* can give rise to liability. See, *e.g.*, Resp. Br. 22 (contending that "a statement of opinion can *mislead* investors not only about the psychological state of the speaker, but also about the subject matter of the opinion and its basis"); U.S. Br. 13 (asserting that "[a] statement of opinion can be misleading either because of what it expressly states or because of what it omits").

That is simply not what Section 11 says: Section 11 imposes liability only for untrue or misleading "statement[s] of * * * material fact."

Of course, Congress could readily have used broader language in Section 11 if it wished to impose broader liability. Indeed, Congress did so in other provisions of the federal securities laws. For example, whereas Section 8(d) of the Securities Act authorizes the SEC to issue stop orders in language materially identical to Section 11, see 15 U.S.C. 77h(d), Section 8(b) gives the SEC broader authority to prevent a registration statement from becoming effective if the statement is "incomplete or inaccurate in any material respect," 15 U.S.C. 77h(b). Congress chose to use narrower language in Section 11, and that choice should be given effect.

2. Neither respondents' nor the government's interpretation can be reconciled with the plain language of Section 11.

a. Respondents contend (Br. 23-29) that a statement of opinion or belief can be actionable simply because the belief turns out to be "objectively incorrect," on the theory that the statement of opinion "may be misleading with respect to its *subject matter*." Br. 23. As noted above, however, that theory rests on the erroneous proposition that Section 11 imposes liability for a misleading *opinion*, rather than a misleading "statement of a material fact." See pp. 3-4, *supra*. And as the government correctly explains, it would defy "ordinary parlance" to say that a statement of opinion necessarily comprises not only a statement of fact as to the speaker's belief, but also a statement of fact as to the underlying subject matter of the statement. Br. 14. For example, "the statement 'I believe X to be true' would not naturally be characterized as an 'untrue statement of * * * fact' simply because X was later determined to be false." Br. 14-15.

b. The government contends (Br. 10-16) that a statement of opinion or belief can be actionable if the speaker lacked a reasonable basis for the stated belief, even where the speaker actually held the belief. But that interpretation has no more of a footing in the statutory language than respondents'.

The government seemingly offers two theories for reconciling its "reasonable basis" standard with the statutory language, each of which is flawed. *First*, the government suggests (Br. 11, 13) that a statement of opinion or belief is misleading if the registration statement omits to state that the speaker lacked a reasonable basis for the stated belief. Like respondents' theory, however, that theory fails because it rests on the erroneous proposition that Section 11 imposes liability for a misleading *opinion*. See pp. 3-4, *supra*.

Second, the government suggests (Br. 11) that every statement of opinion implies a statement that the speaker has a reasonable basis for the opinion. But as the Tenth Circuit explained in an opinion issued since petitioners' opening brief, that implication is not warranted for the simple reason that "people often hold and express opinions based on reasons they find sufficient, even though they lack objective proof sufficient to satisfy others." *MHC Mutual Conversion Fund, L.P.* v. *Sandler O'Neill & Partners, L.P.*, ___ F.3d ___, No. 13-1016, 2014 WL 3765717, at *5 (10th Cir. Aug. 1, 2014). In addition, whether a speaker's basis for an opinion is "reasonable" would itself be a matter of opinion, requiring a judgment-laden determination about how the speaker arrived at the stated belief. Accordingly, even if a statement of opinion implies a statement that the speaker has a reasonable basis for the opinion, the latter statement would also be a statement of opinion—and, as such, could

not give rise to liability under Section 11. See pp. 3-4, *supra*.

The government further suggests (Br. 13-14) that implying a statement about the speaker's basis for its opinion is justified by the role registration statements play in the offering of securities. On that view, however, materially identical statutory language would have a different meaning in Section 11 than in other provisions of the federal securities laws. See pp. 14-17, *infra*. The government's argument also fails because Section 11 "does[] [not] speak of implications imposed by law." *MHC*, 2014 WL 3765717, at *5. Instead, Section 11 provides liability only for untrue or misleading statements of fact that are "required to be stated" or otherwise "contained" in a registration statement: *i.e.*, statements within the four corners of the registration statement itself.

3. All of which is not to say that any statement that begins with "we believe" is automatically a statement of opinion, or that statements of opinion do not sometimes have embedded in them statements of fact. See *Virginia Bankshares*, 501 U.S. at 1109 (Scalia, J., concurring in part and concurring in the judgment); Restatement (Second) of Torts § 538A cmts. c-d. What type of statement is involved will naturally depend on the statement's content and surrounding context. See Pet. Br. 20-21. For example, a statement that "we believe that Meryl Streep will win the Best Actress Oscar next year" would arguably constitute a statement of opinion (*i.e.*, the opinion that Meryl Streep will win) with an embedded statement of fact (*i.e.*, the fact that Meryl Streep appeared in a movie this year).

Here, however, it could not be clearer that Omnicare's statements about legal compliance were pure statements of opinion. As petitioners have explained (Br. 35-

36), Omnicare's statements expressed its judgment that it was in material compliance with the law. At the same time, Omnicare explained in the surrounding context that it may be wrong; the government may interpret the law differently; it might be sued; and if it were found to have violated the law, the consequences could be severe.

Respondents seemingly do not dispute that statements about legal compliance generally constitute statements of opinion. Instead, they suggest (Br. 6-9) that the statements at issue here constitute (or contain) statements of fact because, they assert, Omnicare was unambiguously violating clearly established federal law. That assertion is as baseless as it is irrelevant.[1]

To take one example, consider respondents' allegation that Omnicare obtained "illegal kickbacks" (Br. 7) from drug companies that were proscribed by the Medicare and Medicaid anti-kickback statute, 42 U.S.C. 1320a-7b(b). From respondents' description, one would not realize that the Department of Health and Human Services has promulgated various "safe harbor" regulations concerning that statute, including safe harbors for discount arrangements and payments for bona fide services. See 42 C.F.R. 1001.952.[2] Nor would one realize

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[1] Oddly, respondents contend that "[a]t no point in this litigation" have petitioners defended the accuracy of its statements about legal compliance. Br. 19-20. That is because the litigation is still at the pleading stage. Omnicare has consistently defended its conduct, and no court has found its practices improper. The fact that Omnicare chose to settle certain cases (without any admission of liability) is probative of nothing except the risks companies face in litigating claims under the False Claims Act, which provides for treble damages.

[2] As for respondents' allegations regarding misbranding (Br. 7), respondents omit to mention that Omnicare, in its role as provider of pharmacy-related services, does not market or promote drugs such

that Omnicare explained in its registration statement both that it received rebates and other discounts from drug companies and that regulators had recently expressed concern about such arrangements. See J.A. 136. Especially given the surrounding context, Omnicare's statements that its contracts complied with the law constituted expressions of judgment in a complicated and nuanced area of overlapping statutory and regulatory law. See Pet. Br. 3-4.

In any event, respondents' appeal to the supposed equities should not obscure the fundamental flaw in their logic. A statement about legal compliance is not suddenly transformed into a statement of fact simply because a plaintiff alleges that the speaker committed a clear-cut legal violation. Nor does a general statement about compliance with a complex legal regime—like the statements at issue here—imply any facts about the speaker's underlying conduct. At most, the alleged obviousness of a legal violation "may supply some evidence speaking to the question whether the opinion was sincerely held at the time it was offered." *MHC*, 2014 WL 3765717, at *4 (emphasis omitted). In this case, however, respondents have "expressly * * * disclaim[ed] any allegation" of subjective disbelief. J.A. 273.

In sum, petitioners' statements concerning Omnicare's legal compliance were statements of opinion that are actionable only insofar as petitioners did not hold the stated belief. The court of appeals' contrary interpreta-

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that it could be culpable for "misbranding" them. See *United States* v. *Caronia*, 703 F.3d 149, 153-155 (2d Cir. 2012) (quoting 21 U.S.C. 331(a)). And as for respondents' allegations regarding therapeutic interchange (Br. 8), respondents fail to mention that such programs benefit patients by providing them—upon their physicians' approval—with efficacious and cost-effective care.

tion of Section 11 was erroneous, and, in light of respondents' disclaimer of subjective disbelief, their Section 11 claim should be dismissed.

B. In *Virginia Bankshares*, This Court Correctly Held That A Statement Of Opinion Or Belief Is Actionable Only As A Statement Of The 'Psychological Fact' Of The Speaker's Belief

In contending that statements of opinion can be actionable under Section 11 even where the stated belief is sincerely held, respondents and the government run headlong into this Court's decision in *Virginia Bankshares*, which construed materially identical text in another provision of the federal securities laws and held that statements of opinion are actionable "solely as a misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. In attempting to avoid the logical implication of *Virginia Bankshares*, respondents and the government fundamentally misconstrue that decision.

1. Quoting a footnote in the Court's opinion, respondents claim that the Court decided *Virginia Bankshares* "on the assumption that 'scienter was necessary for liability generally under § 14(a)'"—apparently as a way of supporting the Sixth Circuit's conclusion that the holding of *Virginia Bankshares* was limited to securities claims that require scienter. Br. 41. But that claim is demonstrably false, as a quotation of the entire footnote makes clear:

> In *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 444 n.7 (1976), we reserved the question whether scienter was necessary for liability generally under § 14(a). We reserve it still.

501 U.S. at 1090 n.5.

Respondents' misquotation points up a deeper flaw in their (and the government's) interpretation of *Virginia Bankshares*. The Court did not take "as a given the jury's finding that the directors 'did not hold the beliefs or opinions expressed.'" U.S. Br. 18 (quoting 501 U.S. at 1090); see Resp. Br. 41. In fact, the jury in *Virginia Bankshares* made no such finding. See J.A. at 526-527, *Virginia Bankshares*, *supra* (No. 89-1448) (verdict form). Instead, the Court "interpret[ed]" the jury's verdict of liability as finding a lack of belief precisely because Rule 14a-9 (like Section 11) prohibits only false or misleading statements of *fact*. 501 U.S. at 1087 & n.2, 1090. The Court explained that an opinion "by definition purports to express what is consciously on the speaker's mind." *Id.* at 1090.

The foregoing statements, moreover, were not a passing aside. The Court stated that it was bound to "consider first the actionability *per se* of statements of reasons, opinion, or belief," 501 U.S. at 1090, because the case presented the question "whether statements of reasons, opinions, or beliefs are statements 'with respect to * * * material fact[s]' so as to fall within the strictures of [Rule 14a-9]," *id.* at 1091. The Court's answer to that question was that such a statement can be actionable, but "*solely* as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095 (emphasis added). And that answer applies with equal force to Section 11, because that provision, like Rule 14a-9, prohibits only false or misleading statements of fact.

2. Respondents contend (Br. 42-43) that, when the Court stated in *Virginia Bankshares* that a statement of opinion could be actionable "solely as a misstatement of the psychological fact of the speaker's belief," 501 U.S. at 1095, it was merely identifying *one way* in which such a statement could be actionable. But that contention can-

not be squared with the Court's opinion. After explaining that a statement of opinion could be actionable as a misstatement of the speaker's belief, the Court proceeded to consider whether such a statement would be actionable if it did not *also* "assert[] something false or misleading about its subject matter." See *id.* at 1096. That discussion would make no sense if a statement of opinion could be actionable simply because it is "misleading with respect to its subject matter," as respondents assert. Br. 23 (emphasis omitted).

For its part, the government contends (Br. 16-21) that *Virginia Bankshares* supports its position that a statement of opinion can be actionable *either* because the speaker did not actually hold the stated belief *or* because the speaker lacked a reasonable basis for that belief. But that contention cannot be squared with the Court's opinion either, for all the reasons already discussed. In the passage on which the government primarily relies, the Court merely considered whether allowing liability for subjectively disbelieved statements of opinion would present the risk of vexatious litigation and speculative proof. See 501 U.S. at 1091-1092. The Court concluded that it would not, explaining that the reasons for a speaker's actions could be proven or disproven by the same type of evidence that would be used to prove the speaker's state of mind. See *id.* at 1092-1093.

In the context of that discussion, the Court did state that an opinion expressed in conclusory terms is "reasonably understood to rest on a factual basis that justifies [it] as accurate, the absence of which renders [it] misleading." 501 U.S. at 1093. In so stating, however, the Court was merely explaining how a plaintiff would go about *proving* subjective disbelief; the Court immediately explained that "[p]rovable facts either furnish good reasons to make a conclusory commercial judgment, or

they count against it, and expressions of such judgments can be uttered *with knowledge of truth or falsity* just like more definite statements." *Ibid.* (emphasis added). The Court nowhere suggested that the lack of a reasonable basis would independently be actionable under Section 14(a); at most, the Court recognized that the absence of *any* basis for an opinion may be relevant in proving disbelief.

3. Justice Scalia's concurring opinion in *Virginia Bankshares* confirms that the Court's opinion stands for the proposition that a statement of opinion is false only insofar as it misrepresents the speaker's actual belief. See 501 U.S. at 1108-1109. Respondents' only answer is to observe that "[n]o other Justice joined the concurrence." Br. 43. True enough, but none of the other opinions in *Virginia Bankshares* took issue with Justice Scalia's characterization of the Court's holding. It is no accident that, until the Sixth Circuit's decision in this case, lower courts had similarly, and consistently, read *Virginia Bankshares* to require proof of both subjective disbelief and objective falsity before a statement of opinion could be actionable under the federal securities laws. See, *e.g.*, Pet. Br. 26-27 & n.7 (citing cases). The Sixth Circuit's outlying decision misreads *Virginia Bankshares*, and it should accordingly be reversed.

4. As petitioners have explained (Br. 21-23), the Court's holding in *Virginia Bankshares* comports with the common law's approach to statements of fact under the tort of misrepresentation, the most appropriate common-law analog. As a preliminary matter, it bears emphasizing that the question presented here is not what the common law required, but what the language of Section 11 dictates. See, *e.g.*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008).

Properly understood, however, the common law is consistent with Section 11. At common law, only statements of fact could be the basis for liability for misrepresentation, and "an expression of opinion * * * [was] not a statement of fact." *Southern Development Co.* v. *Silva*, 125 U.S. 247, 255 (1888). Not surprisingly, therefore, at least one member of Congress took the position that the Securities Act did not reach opinions at all, see 77 Cong. Rec. 2913 (1933) (Rep. Mapes), and commentators (including future SEC Chairman and Justice Douglas) did the same, see, *e.g.*, William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 190 n.97 (1933); Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 235-236, 249, 251 (1933). Respondents do not cite a single case holding that a statement of a sincerely held opinion constituted common-law fraud. Instead, at common law, a statement of opinion could be actionable only insofar as it misstated the speaker's opinion, see, *e.g.*, 37 C.J.S. *Fraud* § 45 (West 2014), or contained embedded factual statements, see, *e.g.*, Restatement (First) of Torts § 545 cmt. c (1938).

In discussing the common law, respondents focus on other, less apposite causes of action. Respondents contend the "closest common-law analog" to a claim under Section 11 is a contract claim for rescission. Br. 36. But a claim for rescission could be based on "any manifestation by words or other conduct * * * that * * * amounts to an assertion not in accordance with the facts." Restatement (First) of Contracts § 470 (1932). In any event, respondents' analogy to rescission is misplaced, because Section 11, as amended, does not provide for any form of rescissionary remedy, such as requiring defendants to return plaintiffs' money; instead, it provides only for compensatory damages to make plaintiffs whole for their losses. See 15 U.S.C. 77k(e). The latter

remedy, which Section 11 imposes, is a traditional remedy in tort, not contract. See Restatement (First) of Torts § 901 & cmt. a.

Respondents veer even further afield when they invoke the common law of defamation. See Br. 24. Like a claim for rescission, a claim for defamation does not require an untrue or misleading statement of fact, but instead can be based on a broader category of "defamatory" statement. See, *e.g.*, Restatement (First) of Torts § 558. That distinction is more than just semantic: at the time Section 11 was enacted, statements of opinion and fact alike could give rise to defamation claims. See *id.* §§ 566-567. Respondents cite no evidence that Congress intended that the common law of defamation inform the interpretation of Section 11—or any of the other provisions of the federal securities laws containing materially identical language.

C. The Sixth Circuit Erred By Refusing To Follow The Reasoning Of *Virginia Bankshares* In An Action Brought Under Section 11

In the decision below, the Sixth Circuit refused to apply *Virginia Bankshares*' construction of the falsity element of a Section 14(a) claim to a claim under Section 11. Respondents and the government do not dispute that the language of Section 11 is materially identical to the language of Rule 14a-9—and numerous other provisions of the federal securities laws. Nor do they dispute that, when Congress uses materially identical language in related statutory provisions, it is presumed that Congress intended that language to have the same meaning. Respondents and the government nevertheless highlight various aspects of Section 11 in an effort to give the falsity element of a Section 11 claim a broader meaning. The Court should reject that profoundly atextual effort.

1. Respondents and the government cannot overcome the clear language of Section 11, which imposes the same falsity requirement that appears throughout the securities laws. To the extent that Congress took a different approach in Section 11 than in other provisions, it did so by adjusting other elements of liability—for example, by eliminating the scienter requirement and making loss causation an affirmative defense—not by imposing liability for a broader category of statements or omissions.

Respondents (Br. 39-40) and the government (Br. 29) focus on the first of those adjustments, emphasizing that Section 11 imposes strict liability. But the presence or absence of a scienter requirement was irrelevant in *Virginia Bankshares*, which rested on the textual requirement that there be a false or misleading statement of fact. See pp. 9-10, *supra*. Requiring proof that the speaker did not actually hold the stated belief ensures that liability is limited to false or misleading statements of material fact, because a statement of opinion itself conveys only the fact of the speaker's psychological belief.

Respondents (Br. 37) and the government (Br. 28-29) also suggest that Section 11 imposed heightened duties of disclosure on issuers in the context of registration statements. The government goes so far as to compare issuers to fiduciaries. Br. 29-30. Again, however, Section 11 provides liability for untrue or misleading statements of material fact; it does not impose a general fiduciary duty to disclose *all* material nonpublic information. See, *e.g.*, *MHC*, 2014 WL 3765717, at *6; *Oxford Asset Management, Ltd.* v. *Jaharis*, 297 F.3d 1182, 1190 (11th Cir. 2002); *Cooperman* v. *Individual, Inc.*, 171 F.3d 43, 49-50 (1st Cir. 1999).

2. Respondents contend that petitioners' interpretation of the falsity element would "make[] hash out of" the affirmative defense in Section 11 for defendants other than the issuer. Br. 49. But it is respondents who misapprehend the interplay between the standard for liability and the affirmative defense. The affirmative defense "protect[s] even statements already proven false—statements that would otherwise be sufficient to trigger section 11 liability." *MHC*, 2014 WL 3765717, at *4. Where a statement is false, defendants other than the issuer can avoid liability by showing that they "had, after reasonable investigation, reasonable ground to believe and did believe" that the statement was true. 15 U.S.C. 77k(b)(3). Accordingly, the good-faith affirmative defense allows defendants other than the speaker to avoid liability for a statement of opinion by showing that they *believed* the speaker held the stated belief, even if the speaker actually did not. So understood, the affirmative defense does meaningful work in cases involving statements of opinion.

3. In a similar vein, respondents contend (Br. 53-54) that petitioners' interpretation conflicts with the statutory safe harbor for some forward-looking statements made without knowledge of their falsity. See 15 U.S.C. 77z-2(c)(1)(B), 78u-5(c)(1)(B). As with the affirmative defense, however, the Court faces here "the antecedent question what it takes for an opinion to be false or misleading—what it takes to trigger section 11 in the first place." *MHC*, 2014 WL 3765717, at *4. Congress specifically noted that the safe harbor should not affect the analysis on that antecedent question. See Conf. Rep. No. 369, 104th Cong., 1st Sess. 43, 46 (1995). Instead, the safe harbor simply provides substantive and procedural protections for forward-looking statements. See 15

U.S.C. 77z-2(c)(1)(A), 77z-2(e)-(f), 78u-5(c)(1)(A), 78u-5(e)-(f).

Congress's enactment of the safe harbor, like its inclusion of the affirmative defense, thus provides no justification for construing the falsity element of Section 11 more broadly than the identically worded falsity elements of other federal securities laws—including the provision at issue in *Virginia Bankshares*. Because the Sixth Circuit erred by refusing to apply the reasoning of *Virginia Bankshares* in the Section 11 context, its judgment should be reversed.

D. Like Respondents' 'Objective Falsity' Standard, The Government's 'Reasonable Basis' Standard Would Have Adverse Policy Consequences

As petitioners have explained (Br. 32-38), respondents' "objective falsity" standard would lead to after-the-fact second-guessing, chill the voluntary disclosure of information, and discourage settlements. The government's "reasonable basis" standard would have policy consequences that are at least as pernicious, if not more so.

1. The government's standard would subject issuers and other defendants to the risk of classwide liability whenever a plaintiff could allege that the speaker lacked a reasonable basis for the stated belief, even if the belief was sincerely held. That standard would turn each case into an "ad hoc" inquiry into the reasonableness of a speaker's basis for its opinion. *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988). If anything, that standard would provide even less clarity to issuers than respondents' "objective falsity" standard, because whether a speaker possessed a *reasonable* basis for its opinion is itself a matter of judgment. See pp. 5-6, *supra*. Indeed, under the government's standard, even a statement of opinion that ultimately turns out to be correct could give rise to liabil-

ity, as long as the speaker lacked a reasonable basis at the time the statement was made. See Br. 15, 19 n.4.

As this Court has explained in the context of Rule 10b-5 claims, "such a shifting and highly fact-oriented disposition * * * is [not] a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975). If anything, Section 11 demands even more "certainty and predictability," not less, because it is a strict-liability statute. *Pinter*, 486 U.S. at 652. That is particularly true because Section 11 deals with registration statements, and the requirements for registration statements directly affect issuers' decisions as to whether to raise capital in American markets or elsewhere. See Chamber of Commerce Br. 19-26.

2. Under the government's "reasonable basis" standard, most issuers would take one of two courses, each of which would harm investors. The first course would be to flood a registration statement with minutiae to avoid any argument that the issuer has omitted facts necessary to avoid misleading investors about the basis for its stated opinion. But an issuer could not comply with the government's standard simply by disclosing that it had *some* basis for its opinion. Instead, in order to show that its basis was reasonable, an issuer would presumably have to disclose not only the information that supported its opinion (including commercially sensitive or even privileged information), but also any information that would potentially undermine it. While encouraging disclosure is a central purpose of the securities laws, the government's standard would put issuers in the absurd position of having to make statements with which they disagree and create the risk that issuers would "bury" investors in an "avalanche of trivial information"—an outcome that would disserve, rather than

promote, "informed decisionmaking." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448-449 (1976).

Given the complexities that disclosure would present under the government's standard, it is inevitable that many companies would choose a second course: silence. Because there is no categorical "affirmative duty to disclose" even "material information," "companies can control what they have to disclose * * * by controlling what they say to the market." *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1321-1322 (2011). But that outcome would also disserve investors, by depriving them of potentially helpful information that could be gleaned from statements of opinion. See *Virginia Bankshares*, 501 U.S. at 1090-1091.

3. Like the Sixth Circuit's standard, the government's standard would also discourage issuers from settling litigation. Under the government's standard, an issuer would be faced with the prospect that a future plaintiff might try to use the fact of settlement to allege that the issuer lacked a reasonable basis for prior statements that the issuer made about legal compliance. It bears underscoring that that is precisely what has taken place here: respondents' allegations about the statements at issue here were taken from complaints in *qui tam* actions that had been filed against Omnicare and were later settled (without any finding or admission of liability). See J.A. 191-231, 243-248.

4. Respondents contend (Br. 54-56) that petitioners' interpretation would hamper the SEC's enforcement regime. Conspicuously, however, while the government argues that the SEC has applied a "reasonable basis" standard under other provisions, see U.S. Br. 31-33, it does not affirmatively argue that such a standard is necessary in order to aid the SEC's own enforcement efforts. That is not surprising, both because Section 11

creates only a private right of action, see *id.* at 1, and because the SEC has other tools to prevent statements of opinion in registration statements that it views as misleading—including statements that are "incomplete or inaccurate in any material respect," 15 U.S.C. 77h(b). And under a whole range of provisions of the securities laws, the SEC may take action where the evidence indicates that the speaker did not actually hold the stated belief. Even from the government's own perspective, therefore, its proposed standard is a solution in search of a problem.

E. The SEC Is Not Entitled To Deference For The 'Reasonable Basis' Standard

Finally, to the extent that the government contends (Br. 31-33) that the SEC should receive deference for the "reasonable basis" standard, that contention lacks merit.

1. The government asserts that the SEC has "consistently" taken the position that, under other provisions of the federal securities laws, a statement of opinion can give rise to liability where the speaker lacked a reasonable basis for the stated belief. See Br. 31. In support of that proposition, however, the government cites only four adjudications in the eighty years since the Securities Act and the Securities Exchange Act were enacted—only one in the last forty years, and none in the last twenty. Those exceedingly rare examples are hardly evidence of a "consistent" practice.

And by the government's own admission (Br. 33), even those few adjudications bear little resemblance to the facts of this case. Only one of the adjudications involved a statement of opinion in a registration statement—and the SEC seemingly concluded that the statement was so farfetched that the stated belief could not have been sincerely held (as well as concluding that oth-

er statements made outside the registration statement were false or misleading). See *Hamilton Oil & Gas Corp.*, No. 24D-2258, 1961 WL 61074, at *8, *14 (July 25, 1961). Two other adjudications involved SEC enforcement actions against broker-dealers under Section 15(b) of the Securities Exchange Act. See *Richard J. Buck & Co.*, No. 3-417, 1968 WL 86080 (Dec. 31, 1968); *Alexander Reid & Co.*, No. 8-7105, 1962 WL 68464 (Feb. 8, 1962). Those adjudications are especially inapposite, because brokers have long been recognized to be fiduciaries by virtue of their special relationship to their customers. See, *e.g.*, *Conway* v. *Icahn & Co.*, 16 F.3d 504, 509 (2d Cir. 1994); *Hanly* v. *SEC*, 415 F.2d 589, 596 (2d Cir. 1969). As discussed above, no such fiduciary relationship exists between issuers and prospective shareholders in the context of registration statements. See p. 15, *supra*. And the fourth adjudication relied on lower-court case law that *Virginia Bankshares* effectively overruled. See *Gold Properties Restoration Co.*, No. 3-7735, 1992 WL 211480, at *5 & n.4 (Aug. 27, 1992).

2. Even if the SEC had consistently taken the position that a statement of opinion can give rise to liability where the speaker lacked a reasonable basis for the stated belief, it would be entitled to no deference because the "reasonable basis" standard contradicts the plain language of Section 11 (and other provisions of the federal securities laws). This Court has frequently refused to afford deference to the SEC's interpretations, including where an interpretation is contrary to the unambiguous language of a statute or rule. See, *e.g.*, *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296, 2303 n.8 (2011) (citing cases).

For the reasons discussed above, and as this Court has already held in *Virginia Bankshares*, a statement of opinion necessarily conveys only the fact that the speak-

er held the stated belief, and it is therefore actionable only if the speaker did not actually hold the belief. Neither respondents' nor the government's standard can be reconciled with the plain language of Section 11, which is materially identical to the language the Court was construing in *Virginia Bankshares*. Accordingly, the Court should reverse the judgment below and reinstate the district court's dismissal of respondents' Section 11 claim.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

HARVEY KURZWEIL
RICHARD W. REINTHALER
JOHN E. SCHREIBER
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166

ANDREW C. NICHOLS
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
JOSEPH M. TERRY
JOHN S. WILLIAMS
SARAH K. CAMPBELL
A. JOSHUA PODOLL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the Supreme Court of the United States

OMNICARE, INC., ET AL., PETITIONERS

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JOHN W. AVERY
Deputy Solicitor
DOMINICK V. FREDA
Senior Litigation Counsel
STEPHEN G. YODER
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Law Library

QUESTION PRESENTED

Whether, in a suit under Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, a plaintiff who seeks to impose liability for a statement of opinion in a registration statement, and who alleges that the opinion lacks a reasonable basis, must also allege that the maker of the statement did not subjectively hold that opinion.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal securities laws. This case concerns Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, which authorizes private suits when a registration statement includes any "untrue statement of a material fact" or "omit[s] to state a material fact" that is "necessary to make the statements therein not misleading." The question presented is whether a plaintiff whose Section 11 suit is premised on an issuer's statement of opinion must allege that the maker of the statement did not subjectively hold that opinion. The resolution of that question will affect private actions under Sec-

tion 11, which are an important means of ensuring accuracy in registration statements, as well as Commission stop orders under Section 8 of the Act, 15 U.S.C. 77h. The Court's disposition of this case also may affect the enforcement, by the government and by private parties, of numerous other federal securities laws that prohibit material misstatements and omissions. The United States therefore has a substantial interest in this Court's resolution of the question presented.

STATEMENT

1. The Securities Act of 1933 (Act), ch. 38, 48 Stat. 74, requires an issuer of a security offered to the public through the mails or in interstate commerce to register its offering with the Commission. See 15 U.S.C. 77e.[1] The registration statement must contain certain information about the issuer and the security, and it must be signed by the issuer, its officers, and the majority of its board of directors. 15 U.S.C. 77f, 77g. A prospectus used to market the security must include much of the information from the registration statement. 15 U.S.C. 77e, 77j.

A registration statement generally becomes effective 20 days after filing. 15 U.S.C. 77h(a). The Commission may issue a "stop order" delaying the effectiveness of a registration statement that "includes any untrue statement of a material fact" or that "omits to state any material fact" that is "necessary to make the statements therein not misleading." 15 U.S.C. 77h(d).

The Act also establishes an express private right of action for material misstatements or omissions in

---

[1] This requirement is subject to limited exceptions not at issue here. See 15 U.S.C. 77d.

registration statements. Section 11 of the Act provides that "any person acquiring" a security may sue the issuer, its directors, its underwriters, and others if "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). Section 12 establishes a similar cause of action for material misstatements or omissions in prospectuses. See 15 U.S.C. 77*l*.

Section 11 "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 381-382 (1983) (footnote omitted). A plaintiff "need only show a material misstatement or omission" in the registration statement "to establish his prima facie case." *Id.* at 382. An issuer may avoid liability only if the plaintiff knew of the untruth or omission when he acquired the security. 15 U.S.C. 77k(a). A director, underwriter, or individual defendant may establish certain limited affirmative defenses, including that, after a "reasonable investigation," he had "reasonable ground to believe" and "did believe" that the statements in the registration statement were true. 15 U.S.C. 77k(b)(3)(A).

2. Petitioner Omnicare, Inc., is the nation's largest provider of pharmaceutical care for the elderly and other residents of long-term care facilities. Pet. App. 5a. Respondents are investors who purchased Omnicare stock during a December 2005 public offering. *Id.* at 6a. In conjunction with that public offering,

Omnicare filed a registration statement with the Commission. *Ibid.*

In February 2006, respondents filed this lawsuit against Omnicare and several of its officers and directors (petitioners in this Court). Pet. App. 5a, 7a. In the operative complaint (see *id.* at 6a & n.2), respondents alleged that petitioners are liable under Section 11 for certain statements in the registration statement. *Id.* at 6a-7a. Those statements read:

> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve. * * *
>
> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.

J.A. 201-203 (para. 46) (emphasis omitted) (quoting registration statement); see J.A. 191-192, 226-227 (paras. 27, 91).

In respondents' view, those statements were false and misleading because Omnicare had entered into unlawful kickback arrangements with pharmaceutical manufacturers. J.A. 185-186, 203-226 (paras. 10, 47-90). Respondents further alleged that none of petitioners had "made a reasonable investigation or possessed reasonable grounds" to believe that the statements in the registration statement were truthful and complete. J.A. 274 (para. 183). Respondents also "disclaim[ed] any allegation" of "fraud or intentional or reckless misconduct." J.A. 273 (para. 178).

3. The district court granted petitioners' motion to dismiss the Section 11 claim. Pet. App. 28a-41a. In

the court's view, "statements regarding a company's belief as to its legal compliance are considered 'soft' information and are generally not actionable," unless the complaint alleges that the makers of the statements "knew the statements were untrue at the time they were made." *Id.* at 38a (citation omitted). The court concluded that respondents had not alleged such knowledge here. *Id.* at 38a-40a.

4. The court of appeals reversed. Pet. App. 3a-27a. The court noted that "Section 11 provides for strict liability" and "does not require a plaintiff to plead a defendant's state of mind." *Id.* at 12a. The court concluded that, in order to state a Section 11 claim based on a statement of opinion, the plaintiff need only allege that the opinion was "objectively false" and need not also allege that the statement was "disbelieved by the defendant at the time it was expressed." *Id.* at 16a (citation omitted). The court rejected petitioners' argument that, under *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), a Section 11 plaintiff who alleges a false or misleading statement of opinion must allege (and ultimately prove) that the defendant did not genuinely believe the opinion. Pet. App. 16a-19a.

SUMMARY OF ARGUMENT

A statement of opinion is actionable under Section 11 of the Securities Act, 15 U.S.C. 77k, if it lacked a basis that was reasonable under the circumstances, even if it was sincerely held.

A. Section 11 creates an express cause of action for a registration statement that "contained an untrue statement of material fact" or "omitted to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). A

statement of opinion generally conveys (1) that the maker of the statement genuinely holds the opinion and (2) that the opinion has a basis that is reasonable under the circumstances. If either is not true, the statement may be misleading. Although what constitutes a material omission depends on the circumstances, in the context of a registration statement, a statement of opinion generally implies it has a reasonable basis. That is especially true when the opinion is one about the lawfulness of the company's own conduct.

Petitioners contend that a statement of opinion is actionable under Section 11 only if it is not sincerely held, on the theory that the only fact expressly stated by the opinion is that the speaker holds that opinion. Petitioners overlook that Section 11 applies to both misstatements and omissions.

Because an opinion can be misleading either because it is insincere or because it lacks foundation, the court of appeals correctly held that a Section 11 plaintiff need not allege that the defendant disbelieved the opinion. But the court erred in suggesting that a statement of opinion is actionable whenever it is ultimately proved incorrect. Section 11 liability should be determined based on the facts at the time the statement was made, not at a later time.

B. In *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), this Court recognized that a statement of opinion may be materially misleading either because it is not genuinely held or because it lacks foundation. The Court considered whether directors' statements, in a proxy solicitation, that they believed a proposed merger would result in a high value and fair price for stock were actionable under Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a),

and SEC Rule 14a-9, 17 C.F.R. 240.14a-9. The Court determined that such statements of belief can be materially significant to investors because investors expect the directors to draw on their knowledge and experience and to act in the shareholders' interests. 501 U.S. at 1091. The Court then concluded that the statements were misleading because the jury had found that the directors did not actually believe them and the Court found sufficient evidence to establish that the directors lacked a "factual basis" for their beliefs. *Id.* at 1090, 1093-1094.

Virginia Bankshares did not hold that subjective insincerity always must be present to make a statement of opinion actionable. Because the Court accepted the jury's finding that the directors' statements of belief were insincere, it did not consider whether such a finding is required in every case.

C. Common-law courts recognized that a statement of opinion may be an actionable misrepresentation when it was not genuinely held or when it lacked foundation. Although the general common-law rule was that a statement of opinion regarding a commercial transaction was not actionable, common-law courts recognized numerous exceptions to that rule. A statement of opinion could be actionably false if it was not the speaker's opinion and the recipient was entitled to rely on such an opinion. A statement of opinion also could be misleading if it implied a foundation that was lacking. Modern tort law continues to reflect these two principles. See 3 Restatement (Second) of Torts §§ 525 cmt. d, 539 & cmts. a & b (1977).

D. Imposing Section 11 liability for statements of opinion that are not genuinely held or lack a reasonable basis furthers Congress's intent and fulfills the

Securities Act's purposes. The Act focuses on disclosure of information to potential investors. The registration statement plays a foundational role. It must be filed before any security can be sold, and if it contains any material misrepresentations or omissions, the Commission may prevent sale of the security and a purchaser of the security may sue for damages.

In enacting Section 11, Congress built on common-law principles to create a far-reaching cause of action. Congress imposed liability not only for misstatements, but also for omissions, and it rejected the rule of caveat emptor, instead placing the burden of disclosure on the issuer's directors and officers. And Congress dispensed with proof of scienter, reliance, and causation, permitting only limited affirmative defenses once it was established that a registration statement included a material misstatement or omission.

Imposition of liability for a statement of opinion that is not genuine or that lacks a reasonable basis is consistent with this scheme, because it ensures that registration statements are both literally true and do not omit information that would matter to a reasonable investor. Petitioners are correct that imposing liability under Section 11 based on later events (as the court of appeals suggested) would disserve the Act's purposes. But petitioners go too far in the other direction, because under their view, directors and officers who state opinions that lack foundation could avoid Section 11 liability so long as they genuinely held the opinions.

E. The Commission has consistently recognized that a genuinely held statement of opinion may be materially misleading when it lacks a reasonable basis. In a series of adjudications, the Commission has

explained that "[g]roundless opinions come within the ambit of false or misleading statements prohibited by the securities laws," even if the speaker "personally believes" the statement, because investors expect that the opinions are "responsibly made on the basis of actual knowledge and careful consideration." *Alexander Reid & Co.*, No. 8-7105, 1962 WL 68464, at *4 (Feb. 8, 1962). The Commission has applied these principles in imposing a stop order to prevent a registration statement from becoming effective, see *Hamilton Oil & Gas Corp.*, No. 24D-2258, 1961 WL 61074, at *8, *14 (July 25, 1961); in regulating broker-dealers, see *Richard J. Buck & Co.*, No. 3-417, 1968 WL 86080, at *6 (Dec. 31, 1968), aff'd *sub nom. Hanly* v. *SEC*, 415 F.2d 589 (2d Cir. 1969); *Alexander Reid & Co.*, 1962 WL 68464, at *4; and in issuing a cease-and-desist order to prevent use of misleading documents regarding an initial public offering, see *Gold Props. Restoration Co.*, No. 3-7735, 1992 WL 211480, at *5 (Aug. 27, 1992).

These decisions reflect a consistent interpretation of similar statutory language, and they comport with common-law principles and the purposes of the Act. Accordingly, they should be given significant weight. See *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002). For all of these reasons, the Court should vacate the court of appeals' judgment and remand this case for further proceedings.

ARGUMENT

A STATEMENT OF OPINION IS ACTIONABLE UNDER SECTION 11 IF IT LACKED A REASONABLE BASIS UNDER THE CIRCUMSTANCES, EVEN IF THE OPINION WAS GENUINELY HELD

At issue in this case are statements of opinion in Omnicare's December 2005 registration statement. In the view of the United States, statements of opinion may be actionable under Section 11, either because the maker of the statement did not actually hold the opinion stated or because the statement lacked a basis that was reasonable under the circumstances in which the statement was made. The court of appeals therefore correctly held that a plaintiff need not allege subjective disbelief to recover under Section 11 for a statement of opinion. The court erred, however, in holding that a statement of opinion is actionably false whenever it is ultimately determined to be wrong. Because the court of appeals applied an erroneous legal standard, this Court should vacate the judgment below and remand for further proceedings.

A. A Statement Of Opinion Is Actionable Under Section 11 If It Either Misrepresents The Speaker's Actual Belief Or Conveys A False Impression As To The Nature Or Extent Of The Inquiry On Which The Statement Was Based

1. Section 11 creates an express cause of action for material misstatements or omissions in a registration statement. It provides that "any person acquiring" a security may sue the issuer, its officers and directors, and others if "any part of" the security's registration statement, "when such part became effective, contained an untrue statement of a material fact" or

"omitted to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a).

A statement of opinion generally conveys the facts that (1) the maker of the statement genuinely holds the opinion, and (2) there is a basis for the opinion that is reasonable under the circumstances. See, *e.g.*, *Weiss* v. *SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006). First, a statement of opinion typically constitutes an express assertion that the speaker actually holds the stated belief. Thus, if a corporate director states, "I believe that my company's conduct is lawful," she represents as fact that she holds a certain view about the legality of the company's conduct. If the director actually believes the company's conduct to be unlawful, then she has made "an untrue statement of material fact." 15 U.S.C. 77k(a).

Second, a statement of opinion implies the existence of a basis for the opinion that is reasonable under the circumstances. If a company says in a registration statement, "We believe our conduct is lawful," it implies that it has a reasonable basis for that conclusion. If there is no such basis, the speaker has "omitted to state a material fact," 15 U.S.C. 77k(a)—the lack of foundation for the opinion—that is necessary to make the statement not misleading.[2] For example, if the company states that its conduct is lawful without having conducted any legal analysis, the statement of opinion is incomplete because it fails to apprise the

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[2] A statement of opinion that lacks a reasonable basis also can be viewed as one that implies a statement that is untrue. See, *e.g.*, *Virginia Bankshares*, 501 U.S. at 1095-1096 (noting that there may be "something false or misleading in what the statement expressly or impliedly declares about its subject").

reader that no such analysis occurred. The company's statement of opinion may likewise be misleading if the company's lawyers have questioned the legality of its conduct and the statement contains no reference to that fact.

What constitutes a material omission from a statement of opinion depends on the circumstances under which the opinion is offered. In their daily lives, individuals often express off-the-cuff opinions on myriad subjects as to which they possess, and are understood to possess, no special expertise. A registration statement, however, is a formal document filed with the Commission as a legal prerequisite to the sale of a security to the public. See 15 U.S.C. 77e(a), 77f. The information required in a registration statement generally consists of facts, not opinions. See 15 U.S.C. 77g(a), 77aa Sched. A. Because the registration statement is so important, Section 11 imposes far-reaching liability on issuers and corporate officers for material misstatements and omissions. If an issuer volunteers a statement of opinion in a registration statement, the reader would naturally expect that the issuer has undertaken a significant investigation and has concluded that the opinion has a solid foundation. That is especially true where, as here, the statement concerns the issuer's own compliance with the law, so that the issuer has every incentive to conduct a thorough investigation.

2. Petitioners contend (Br. 14-16) that a statement of opinion is actionable under Section 11 only if the speaker does not sincerely hold the belief stated. They assert (Br. 14-15) that Section 11 "imposes liability only for untrue statements of material *fact*," and that "[t]he only *fact* conveyed by a statement of opin-

ion or belief" is "that the speaker held the stated belief." But Section 11 does not limit liability to express misrepresentations of fact; it also applies if a registration statement "omit[s] to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a).

A statement of opinion can be misleading either because of what it expressly states or because of what it omits. At least in circumstances where readers and listeners would expect a speaker to conduct a reasonable inquiry before expressing a particular opinion, a statement of opinion that lacks a reasonable basis and fails to mention that lack of foundation has "omitted" a fact that is "necessary" to make the statement of opinion not misleading. Congress imposed liability for such omissions in Section 11 to ensure that a company seeking to sell a security to the public tells "the whole truth" in its registration statement, rather than providing incomplete statements and half-truths. H.R. Rep. No. 85, 73d Cong., 1st. Sess. 2 (1933) (quoting President Franklin D. Roosevelt's statement) (House Report).

Although petitioners acknowledge (Br. 20-21) that a statement of opinion can be misleading when it lacks a factual basis, they assert that this is so only if the statement "contain[s] an explicit representation about the factual basis for the belief." Section 11 is not so limited, however, because it imposes liability both for factual misstatements and for omissions that render a literally-accurate statement misleading. Petitioners also assert (Br. 16) that, so long as Omnicare "did in fact hold the stated belief" that its conduct was lawful, then no "other 'fact' * * * would need to be disclosed in order to render the statement 'not mislead-

ing.'" But the assertion (particularly in a formal document like a registration statement) that Omnicare believes its contracts are lawful implies that the company has a reasonable basis for so believing. If no such reasonable basis exists, Omnicare's omission of that fact from its registration statement renders its statement of opinion misleading.

3. Because a statement of opinion may be false or misleading in two different ways, the court of appeals was correct to hold that respondents were not required to plead or prove Omnicare's subjective disbelief in the opinions it stated. See Pet. App. 15a-17a. The court's stated reasons for that holding, however, were incomplete. The court explained that, because Section 11 does not require proof of scienter, "once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim." *Id.* at 16a. It is true that Section 11 does not require a plaintiff to prove any state of mind to recover; Section 11 imposes near-absolute liability on the issuer, 15 U.S.C. 77k(a), and what amounts to negligence liability on individual defendants, 15 U.S.C. 77k(a) and (b). Where the allegedly false or misleading statement is one of opinion, however, proof of the defendant's state of mind is directly relevant to whether that statement is "untrue." As explained above, statements of opinion are often express representations about the views the speaker holds, and the truth or falsity of such a representation logically depends on whether the speaker subjectively held the stated opinion.

The court of appeals also erred in suggesting that a statement of opinion is actionably false whenever the stated opinion is ultimately found to be incorrect. See Pet. App. 11a, 16a, 20a-22a. In ordinary parlance, the

statement "I believe X to be true" would not naturally be characterized as an "untrue statement of * * * fact" simply because X was later determined to be false. Liability under Section 11 depends, moreover, on whether "any part of the registration statement" contained a material misstatement or omission "when such part became effective." 15 U.S.C. 77k(a). Accordingly, whether a statement of opinion had sufficient basis depends on facts existing at the time the statement was made, not at a later time when a court can look back with the benefit of hindsight. See, *e.g.*, *Marx* v. *Computer Scis. Corp.*, 507 F.2d 485, 490 (9th Cir. 1974). The mere fact that an opinion is ultimately determined to be incorrect does not mean that the statement of opinion was false when made.

4. An example from outside the securities-law context illustrates these concepts. Suppose that a judge assigns a law clerk to a case some weeks before the scheduled date of oral argument, and subsequently asks the clerk on the eve of argument, "Which party do you think should prevail?" If the clerk replies, "I think the appellant has the better legal argument," the judge will reasonably infer both that the statement reflects the clerk's sincere legal judgment and that the clerk's opinion is premised on significant legal research and analysis.

If the law clerk actually believes that the appellant's legal argument is weak, but professes to hold the contrary view because he has a financial interest in the appellant's business, the statement is literally false because the clerk has claimed to hold an opinion that he did not actually believe. If the clerk sincerely believes that the appellant has the better of the argument, but the clerk's only study of the case consists of

reading a brief on-line summary of the competing legal theories, the clerk's statement of opinion may be literally true but will still be misleading, since it omits the critical fact that the clerk has not performed the expected legal analysis.[3] But if the clerk accurately communicates his subjective view of the merits, and that view is premised on reasonably diligent legal analysis, the clerk's statement of opinion would not be untrue or misleading simply because the court ultimately ruled in the appellee's favor.

B. The Court In *Virginia Bankshares* Recognized That Opinions May Be Actionable Under The Securities Laws Either If They Are Not Genuinely Held Or If They Lack Foundation

1. In *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), the Court considered whether corporate directors can be liable under Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a), and SEC Rule 14a-9, 17 C.F.R. 240.14a-9, for their statements of reasons, opinions, or beliefs in a proxy solicitation. 501 U.S. at 1090-1091. Section 14(a) and Rule 14a-9 prohibit statements in proxy solicitations that are "false or misleading with respect to any material fact" or that "omit[] to state any material fact necessary in order to make the statements * * * not false or misleading." *Id.* at 1087 n.2 (quoting Rule 14a-9). At

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[3] The situation would be different if the judge asked the clerk for his on-the-spot reaction to a newly-asserted legal argument. The clerk would still make an untrue statement of fact if he professed to hold an opinion that he did not actually believe. But, absent any contextual reason for the judge to infer that the clerk's stated opinion was premised on significant prior study, the clerk's failure to disavow such study would not be the sort of omission that would render the statement of opinion misleading.

issue in *Virginia Bankshares* were statements by the directors urging the adoption of a merger proposal and stating that the directors supported the proposal because shareholders could obtain a "high" value and a "fair" price for their stock. *Id.* at 1088. The Court concluded that those statements could be actionable under the securities laws. *Id.* at 1093-1095.

The Court first determined that statements of reason or belief may be "materially significant" to shareholders. *Virginia Bankshares*, 501 U.S. at 1090-1091. The Court explained that a reasonable investor would place weight on the directors' beliefs about the benefits of a merger because "[s]hareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources," and because the directors are "oblige[d] * * * to exercise their judgment in the shareholders' interest." *Id.* at 1091.

The Court in *Virginia Bankshares* then explained that statements of belief "are factual in two senses": "as statements that the directors do act for the reasons given or hold the belief stated," and "as statements about the subject matter of the reason or belief expressed." 501 U.S. at 1092-1093. On the first point, the Court observed that a statement of reasons or belief "purports to express what is consciously on the speaker's mind." *Id.* at 1090. On the second point, the Court explained that the directors' statements about the stock's value "are reasonably understood to rest on a factual basis that justifies them as accurate," and that the "absence" of such a basis would "render[] them misleading." *Id.* at 1093. The Court thus recognized that the directors' statements could be problematic if the directors *either* did not subjectively believe

that the merger would benefit shareholders *or* did not have a reasonable basis for the opinion stated.

Applying those principles, the Court concluded that the directors' statements in *Virginia Bankshares* were actionable under Section 14(a) and Rule 14a-9. The Court took as a given the jury's finding that the directors "did not hold the beliefs or opinions expressed," and it therefore "confine[d] [its] discussion to statements so made." 501 U.S. at 1090. The Court accordingly did not decide whether, or under what circumstances, a defendant can be liable under Section 14(a) and Rule 14a-9 for stating an opinion that *is* sincerely held. The Court then held that the plaintiffs had adduced sufficient evidence (including "provable facts about the Bank's assets" and "actual and potential levels of operation") to show that the directors had lacked a "factual basis" to make their statements "accurate." *Id.* at 1093-1094.

Having considered the situation where the statement of opinion both "misstate[s] the speaker's reasons and also mislead[s] about the stated subject matter," the Court went on to consider an alternative scenario not before the Court—a statement of belief that is "open to objection only" because it is "a misstatement of the psychological fact of the speaker's belief in what he says." *Virginia Bankshares*, 501 U.S. at 1095. The Court stated that "proof of mere disbelief or belief undisclosed should not suffice for liability under § 14(a)." *Id.* at 1096. The Court explained that "it would be rare to find a case with evidence solely of disbelief or undisclosed motivation without further proof that the statement was defective as to its subject matter," and that imposing liability based on subjective disbelief alone would unduly ex-

pand Section 14(a)'s implied private right of action. *Ibid.*

2. The *Virginia Bankshares* Court recognized the common-sense proposition that a company cannot escape liability for making misleading statements simply by couching them as opinions. The Court also recognized that a statement of opinion or belief can be false or misleading *either* because it is not genuinely held *or* because it lacks foundation. Section 11, like Section 14(a) and Rule 14a-9, imposes liability both for false statements of material fact and for omissions that render the explicit statements misleading. Compare 15 U.S.C. 77k with 15 U.S.C. 78n(a) and 17 C.F.R. 240.14a-9. Whether contained in a proxy solicitation or a registration statement, a director's statement of opinion can be materially misleading either because it is "knowingly false" or because it is "misleadingly incomplete." *Virginia Bankshares*, 501 U.S. at 1095.[4]

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[4] Although the Court in *Virginia Bankshares* recognized that a statement of opinion can be misleading in two different ways, it stated in dicta that Section 14(a) does not impose liability if the only objection to the opinion is that it was not sincerely held. 501 U.S. at 1095-1096. Because respondents appear to have disavowed any contention that Omnicare did not subjectively believe the opinions it stated (J.A. 273 (para. 178)), this case presents no occasion for the Court to decide whether the same rule should apply under Section 11. There are good reasons, however, not to apply the Court's dicta about Section 14(a) to Section 11. As the *Virginia Bankshares* Court recognized, under modern tort law, a statement of opinion can be an actionable misrepresentation either because it does not reflect the speaker's actual belief or because it lacks foundation. See 501 U.S. at 1092-1093. The Court departed from that common-law principle because of a perceived need to narrow the Section 14(a) implied cause of action. *Id.* at 1096. Section 11, by contrast, includes an express private right of action

3. Petitioners read *Virginia Bankshares* to hold that, in order for a statement of opinion to be actionable under Section 14(a), the plaintiff must establish that the speaker did not actually hold that opinion. Pet. Br. 16-19. Petitioners rely (Br. 17-18) on the Court's observation that "[a] statement of belief may be open to objection only * * * as a misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. Petitioners construe that observation to reflect the Court's legal conclusion that a statement of opinion is actionable under the securities laws "only" if it "misstate[s]" that "psychological fact."

Read in context, however, the quoted language was making a quite different point. In the sentence preceding the quoted language, the Court explained that the directors' "statements of reasons" in *Virginia Bankshares* itself were objectionable in two different respects because they both "misstate the speaker's reasons and also mislead about the stated subject matter." 501 U.S. at 1095. The Court's ensuing observation that "[a] statement of belief may be objectionable only in the former respect" (*ibid.*) simply reflected the Court's recognition that, in a different (hypothetical) case, the plaintiff's only proffered basis for impugning a particular statement of opinion might be the defendant's subjective insincerity. Indeed, because the Court went on to state in dicta that subjective disbelief alone would *not* render a statement of opinion actionable under Section 14(a), the quoted language cannot plausibly be read to suggest that

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that was intended to encompass conduct beyond common-law fraud. See 15 U.S.C. 77k; see also pp. 27-29, *infra*.

such disbelief is the *only* valid basis for imposing liability.

C. Common-law Courts Imposed Liability For Statements Of Opinion That Either Were Not Genuinely Held Or Lacked A Reasonable Basis Under The Circumstances

1. The general rule at common law was that "a misrepresentation cannot be made of a matter of opinion," because the "person addressed * * * is assumed to be equally able to form his opinion, and to come to a correct judgment in respect to the matter." 2 John Norton Pomeroy, Jr., *A Treatise on Equity Jurisprudence* § 878, at 1813-1814 (4th ed. 1918) (Pomeroy); see also 2 Thomas M. Cooley, *A Treatise on the Law of Torts* § 352, at 567 (D. Avery Haggard ed., 4th ed. 1932) (Cooley). That principle was based on the doctrine of caveat emptor, and on the principle that courts of equity would not intervene where matters of opinion were "equally open to the inquiries of both parties" and "neither could be presumed to trust the other." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 269, at 266 (14th ed. 1918).

Despite that general rule, the common law identified certain circumstances in which a statement of opinion could be an actionable misrepresentation. First, a statement of opinion could be actionably false if it did not accurately reflect the speaker's actual opinion. A "statement that such an opinion exists" is an "affirmation *of a fact*," and if "[t]he existence of an opinion" is a "fact material to the proposed transaction" and "is untrue," then "it is a misrepresentation." Pomeroy § 878, at 1814-1815. If the person stating the opinion was an "expert[]" or had "special knowledge" of the transaction, "the other party ha[d]

a right to rely on [the opinion] without bringing his own judgment to bear." Cooley § 352, at 573 (citation omitted). A similar principle applied when there was a special "relationship between the parties," such as when "one party stands in a fiduciary capacity toward the other," in which case "the latter will naturally repose confidence in his opinions." 2 Fowler V. Harper et al., *Harper, James, and Gray on Torts* § 7.8, at 506 (3d ed. 2006) (Harper). The same was true of other relationships involving a "great disparity in knowledge." *Id.* at 506-507. In all those circumstances, "[t]he expression of opinion must be an honest one"; if a person "express[es] * * * a dishonest opinion to one entitled to rely upon it," then "an action will lie." Cooley § 352, at 572-573.

Second, common-law courts recognized that statements of opinion could actionably be false or misleading if they implied a foundation for the opinion that in fact was lacking. A statement of opinion may "imply the possession of information about the existence of external facts" justifying the opinion, and "as the implication of external facts increases," so does the "justification for reliance," especially where "there is also disparity of knowledge or expertise." Harper § 7.8, at 509. An opinion also may "create liability" if it "implies * * * the non-existence of the fact which makes the statement false" but the speaker actually knows that such facts exist. Story § 269, at 268 n.5.

2. Common-law misrepresentation decisions reflect those principles. In one leading case, a buyer of a hotel was permitted to rescind the contract because the seller had told the buyer that the current tenant was "a most desirable tenant," even though the tenant

was struggling financially. *Smith* v. *Land & House Prop. Corp.*, (1884) 28 Ch. D. 7 (C.A.) at 7-10 (Eng.). The seller argued that its statement was not actionable because it was "a mere expression of opinion." *Id.* at 10 (quoting party's argument). The court disagreed, holding that the seller had made a "misrepresentation of a specific fact." *Id.* at 15 (opinion of Bowen, L.J.); see *id.* at 13 (opinion of Baggallay, L.J.); *id.* at 17 (opinion of Fry, L.J.). As Lord Justice Bowen explained, "it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact," because there is no liability for a statement of opinion when "the facts are equally well known to both parties." *Id.* at 15. But when "the facts are not equally known to both sides," then "a statement of opinion by the one who knows the facts best * * * impliedly states that [the speaker] knows facts which justify his opinion." *Ibid.*

In the context of a criminal fraud conviction, Judge Learned Hand explained that "[s]ome utterances are in such form as to imply knowledge at first hand, and the utterer may be liable, *even though he believes them*, if he has no knowledge on the subject." *Knickerbocker Merch. Co.* v. *United States*, 13 F.2d 544, 546 (2d Cir.) (emphasis added), cert. denied, 273 U.S. 729 (1926). Similarly, several state supreme courts applied the rule set out by Lord Justice Bowen in *Smith* to impose liability for statements of opinion that lacked foundation. For example, the Alabama Supreme Court found a statement of opinion about whether land would be suitable for use as a dairy fraudulent because "[i]f the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often

the statement of a material fact, for he impliedly states that he knows facts which justify his opinion." *Shepherd* v. *Kendrick*, 181 So. 782, 784 (1938) (quoting *Smith*, (1884) 28 Ch. D. at 15 (opinion of Bowen, L.J.)); see, *e.g.*, *Kefuss* v. *Whitley*, 189 N.W. 76, 81-82 (Mich. 1922) (relying on Lord Justice Bowen's explanation to assess liability for statements as to the value and salability of a tract of land).

3. Modern tort law continues to reflect the view that a statement of opinion may be misleading for either of the two reasons discussed above. The Second Restatement of Torts recognizes that the "holding of an opinion" is a "fact" that can be misrepresented. 3 Restatement (Second) of Torts § 525 cmt. d (1977) (Restatement). "[A]n expression of opinion is itself always a statement of at least one fact—the fact of the belief, the existing state of mind, of the one who asserts it." W. Page Keeton et al., *Prosser and Keeton on Torts* § 109, at 755 (5th ed. 1984) (Prosser and Keeton).

Even when an opinion is sincerely held, however, a person who expresses it can sometimes be held liable at common law if his statement of opinion implies the existence of a reasonable predicate that in fact is lacking. The Second Restatement explains: "A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement" that the speaker "knows facts sufficient to justify" the opinion, or that he at least does not know facts "incompatible with his opinion." Restatement § 539; see *id.* § 539 cmt. a. A statement of opinion thus may "carry with it an implied assertion" that the speaker "know[s] facts which justify it." Prosser and Keeton

§ 109, at 760. That is especially true "when the maker [of the statement] is understood to have special knowledge of the facts unknown to the recipient." Restatement § 539 cmt. b. If a person is "reasonably understood" as conveying that he has a basis for his opinion, "he is subject to liability if he has not made [an] examination, or if he has not found facts that justify the opinion." *Ibid.*

4. In discussing Section 11's common-law antecedents (Pet. Br. 21-22), petitioners overlook the substantial body of law recognizing that statements even of sincerely-held opinions can be actionable if they imply a foundation that is lacking. See pp. 22-25, *supra*. Petitioners cite decisions stating that "knowledge of [a statement's] falsity" is required to establish fraud, *Howard* v. *Riggs Nat'l Bank*, 432 A.2d 701, 706 (D.C. 1981); see *Seymour* v. *Chicago & Nw. Ry.*, 164 N.W. 352, 354 (Iowa 1917), but that is because scienter is an element of common-law fraud, not because subjective disbelief is the only way in which a statement of opinion can be misleading. Indeed, the sources upon which petitioners rely recognize that whether a statement of opinion is misleading "depends on the circumstances in which the statement is made," and that a person can be liable for such a statement if it "amounts to an implied assertion that the speaker knows facts justifying the opinion" and such facts are lacking. 37 C.J.S. *Fraud* § 21, at 200-201 (2014).

D. Imposing Section 11 Liability For Statements Of Opinion That Are Not Genuinely Held Or Lack A Reasonable Basis Furthers Congress's Intent And Fulfills The Act's Purposes

1. Congress enacted the Securities Act of 1933, ch. 38, 48 Stat. 74, in the aftermath of the 1929 stock

market crash and during the Great Depression. House Report 1-3. The Act was the first national regulation of securities, and it focused on disclosure of information to the government and to potential investors. It was enacted after President Franklin D. Roosevelt urged Congress to require that "every issue of new securities to be sold in interstate commerce" be "accompanied by full publicity and information," where the "burden of telling the whole truth" would be "on the seller." *Id.* at 1-2 (quoting President's statement).

The linchpin of the Act is the requirement of a registration statement. See House Report 7 (noting the "basic importance" of the registration statement). The Act makes it unlawful to offer a security or to transmit a prospectus to potential buyers unless a registration statement containing certain information and signed by certain corporate officers is in effect. See §§ 5(a) and (b), 6(a), 7, 48 Stat. 77-78 (15 U.S.C. 77e(a) and (b), 77f(a), 77g). The registration statement must be filed with the Commission, and if it is incomplete or contains any material misstatement or omission, the Commission may issue a stop order and prevent the sale of the security. See § 8(a) and (d), 48 Stat. 79-80 (15 U.S.C. 77h(a) and (d)). Under the provision at issue here, a purchaser of the security also may sue for any material misrepresentations or omissions in the registration statement. See § 11, 48 Stat. 82-83 (15 U.S.C. 77k). Congress applied similar rules to prospectuses, requiring that they contain certain information and authorizing a cause of action for material misstatements or omissions. See §§ 10, 12, 48 Stat. 81, 84 (15 U.S.C. 77j, 77*l*). Together, these provisions embody a policy of "full and fair disclosure"

so that investors can make an "accurate judgment upon the value of the security." House Report 3.

2. The Act's imposition of civil liability for material misstatements or omissions in a registration statement was premised on, but went well beyond, common-law fraud principles. Although some courts had imposed liability for misstatements in the sales of securities, their "piecemeal" approach had proved unsatisfactory, Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 227 (1933) (Shulman), and the "reach of strict fraud doctrine" was "far too short" to fulfill the goals of the 1933 Act. *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509, 516 (1947). Accordingly, in fashioning the Act's civil-liability provisions, Congress "borrowed heavily from the background of the common law" (*id.* at 511) but also broadened liability in several important respects.

Congress rejected the common-law "rule of caveat emptor" and placed the burden of disclosure on the issuer and its officers. House Report 2 (quoting President Roosevelt's statement); see, *e.g.*, *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Rather than treat the issuance of a security as an arm's-length transaction where the parties are on equal footing, Congress recognized that an issuer's directors have particular knowledge about the company. Also, the Act imposes liability for material omissions as well as for material misstatements. Under the common law, issuers sometimes could avoid liability by "omitting mention of a variety of matters and confining [the] circular and prospectus to truthful description of the show window without taking the investor through the store behind it." Shulman 242. The Act went further, requiring issuers to provide "a

picture not simply of the show window, but of the entire store." *Ibid.*

The Act also imposes a standard of care on directors, underwriters, and other persons involved in preparing the registration statement. Although some courts (including this Court) had, in individual cases, imposed duties of care on persons selling securities, see, *e.g.*, *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 203-204 (1900), the "system as a whole" had "failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other people's money." James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 30 (1959). The Act holds the issuer and its officers to "the high standards of trusteeship," on the theory that "those responsible for statements upon the face of which the public is solicited to invest its money" must provide the public with full information. House Report 3, 5, 9; see H.R. Conf. Rep. No. 152, 73d Cong., 1st Sess. 26 (1933). That standard is embodied in the "reasonable belief" affirmative defense, which assesses reasonableness from the standard "of a person occupying a fiduciary relationship." Act § 11(b)(3) and (c), 48 Stat. 82-83 (15 U.S.C. 77k(b)(3) and (c)).[5]

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[5] In 1934, Congress amended Section 11's affirmative defense to provide that "the standard of reasonableness shall be that required of a prudent man in the management of his own property." Securities Exchange Act of 1934, ch. 404, § 206(c), 48 Stat. 907. That change did not effect a departure from fiduciary standards. See H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934) (provision was amended to use "the accepted common law definition of the duty of a fiduciary").

Section 11 departed from common-law fraud requirements in other respects as well. Rather than require proof of scienter, Congress imposed "virtually absolute" liability for issuers of a security, and placed "the burden of demonstrating due diligence" on directors, underwriters, and others. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983). A Section 11 plaintiff also need not prove either that he reasonably relied on the issuer's actionable statements or that those statements caused the plaintiff's loss. Shulman 248. Section 11 thus imposes a "heav[y] legal liability" on an issuer and its representatives, one that Congress thought justified because such persons have a "particularly heavy" "moral responsibility to the public." House Report 9.

3. Imposition of liability for a statement of opinion that either is not genuinely held or lacks a reasonable basis is consistent with the Act's design. The Act imposes liability when a registration statement "contain[s] an untrue statement of a material fact *or* omit[s] to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a) (emphasis added). Congress's use of the disjunctive makes clear that, even if all statements of fact contained in a registration statement are literally true, the issuer may nevertheless be held liable if its failure to disclose other facts renders the explicit statements misleading. In addition, the Act's imposition of fiduciary standards on corporate officers reflects Congress's view that such officers have both specialized knowledge and an obligation to act in shareholders' interest. See Cooley § 352, at 573; Harper § 7.8, at 506; see also *Virginia Bankshares*, 501 U.S. at 1091. Because investors would reasonably

expect that issuers' statements of opinion are premised on an adequate factual foundation, an issuer's failure to disclose that no such foundation exists can cause the harms that Section 11 was intended to prevent.

4. Petitioners contend (Br. 32-38) that the court of appeals' approach would disserve the Act's purposes by imposing "liability by hindsight." In that respect, petitioners are correct. Section 11 liability depends on the registration statement's accuracy when the statement becomes effective, 15 U.S.C. 77k, because Congress's concern was that investors must be able to make an informed decision at the time of the public offering. House Report 3-4, 7, 9. To impose Section 11 liability on an issuer or its officers simply because a statement of opinion in a registration statement ultimately was proved false, even though the opinion was genuinely and reasonably held, would effectively treat the statement of opinion as a guarantee. The Act does not go that far. Rather, so long as an opinion expressed in a registration statement is sincerely held and is premised on an inquiry that is reasonable under the circumstances, a subsequent determination that the stated opinion was incorrect would not imply that the issuer's statement was either false or misleading.

For those reasons, the court of appeals misconstrued the Act by suggesting that a statement of opinion is actionable under Section 11 whenever the stated opinion is ultimately found to be incorrect. Petitioners go too far in the opposite direction, however, by arguing that statements of opinion are actionable *only* when the stated beliefs are not sincerely held. Petitioners' approach disregards Congress's decision to prohibit material omissions as well as express false

statements of fact. And, contrary to petitioners' contentions (Br. 34, 36), imposing Section 11 liability for opinions that are subjectively believed but that lack any reasonable foundation would pose no serious threat of "unpredictable" or "massive" liability. The issuer decides when to submit a registration statement, and if the issuer chooses to volunteer an opinion about its business, it is reasonable for investors to expect both that the opinion is honestly held and that it is premised on an inquiry sufficient to make it worthy of investor credence.

E. The SEC Has Consistently Recognized That Statements Of Opinion That Are Not Genuine Or That Lack A Reasonable Basis May Be Actionable Under The Securities Laws

1. The Commission's longstanding practice is consistent with the foregoing principles. For more than 50 years, the Commission has imposed liability in formal adjudications for statements of opinion made in bad faith or without a reasonable basis.

In *Hamilton Oil & Gas Corp.*, No. 24D-2258, 1961 WL 61074 (July 25, 1961), the Commission issued a stop order suspending the effectiveness of a registration statement because the statement included several opinions that lacked a reasonable basis. Without expressing a view on whether the opinions were sincerely held, the Commission explained that a statement of opinion that "anticipated income" would "be sufficient to defray the current operating expenses of the company" lacked a reasonable basis and "was so out of line with the company's past experience that it must be considered false." *Id.* at *14. The Commission also found it misleading for the registration statement to announce the expectations that the company would be

listed on the American Stock Exchange and that the stock would be worth $5 per share by a certain date, without also disclosing known facts that undercut those predictions. *Id.* at *8.

The Commission likewise has held that, under the anti-fraud provisions of the Securities Act and the Exchange Act, a broker-dealer who states an opinion to his customer in bad faith or without a reasonable basis has made a false statement. In *Alexander Reid & Co.*, No. 8-7105, 1962 WL 68464 (Feb. 8, 1962), the Commission held that "[g]roundless opinions come within the ambit of false or misleading statements prohibited by the securities laws," and it observed that a contrary approach would "run[] counter to the objectives of the Securities laws." *Id.* at *4. The Commission explained that "[a] broker-dealer in his dealings with customers impliedly represents that his opinions and predictions respecting a stock * * * are responsibly made on the basis of actual knowledge and careful consideration." *Ibid.* The Commission found it insufficient that the "dealer personally believes the representation for which he has no adequate basis," because the lack of sufficient basis rendered the statement misleading. *Ibid.*

Applying the same principles in *Richard J. Buck & Co.*, No. 3-417, 1968 WL 86080 (Dec. 31, 1968), aff'd *sub nom. Hanly* v. *SEC*, 415 F.2d 589 (2d Cir. 1969), the Commission censured a broker-dealer that had made "optimistic representations * * * without disclosure of known or reasonably ascertainable adverse information which rendered them materially misleading." *Id.* at *6. The Commission explained that the individual making the "optimistic or favorable representations" was "under a duty to disclose the

known or then reasonably ascertainable facts" that undercut the representations, in order to "enable the customer to assess the weight to be given to the optimism of the salesman and make an informed judgment on whether to purchase or retain the stock." *Ibid.* Similarly, in *Gold Props. Restoration Co.*, No. 3-7735, 1992 WL 211480 (Aug. 27, 1992), the Commission imposed a cease-and-desist order because documents disseminated to the public in connection with an initial public offering contained opinions that lacked foundation. The Commission explained that "[t]he gold reserves and estimates of value contained in each of these documents were materially false and misleading, because, among other things, the Respondents had no reasonable basis for the statements." *Id.* at *5.

2. The Commission's longstanding view that a statement of opinion is misleading when it lacks a reasonable basis under the circumstances is entitled to deference. Although only one of the Commission's formal adjudications (*Hamilton Oil & Gas Corp.*) concerned statements of opinion in a registration statement, all of the adjudications involved provisions that prohibit material misstatements or omissions. See 15 U.S.C. 77h(d), 77q(a)(2), 78j(b); 17 C.F.R. 240.10b-5(b). Those interpretations reflect a consistent and reasonable view of similar statutory language, and they comport with common-law concepts and the purposes of the securities laws. Accordingly, they should be given significant weight. See *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JOHN W. AVERY
Deputy Solicitor
DOMINICK V. FREDA
Senior Litigation Counsel
STEPHEN G. YODER
Senior Counsel
Securities and Exchange Commission

JUNE 2014

APPENDIX

1. 15 U.S.C. 77e provides:

Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title

It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

(d) Limitation

Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17, Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with re-

spect to such securities with the Commission, subject to the requirement of subsection (b)(2).

(e) Security-based swaps

Notwithstanding the provisions of section 77c or 77d of this title, unless a registration statement meeting the requirements of section 77j(a) of this title is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of Title 7.

2. 15 U.S.C. 77f provides:

Registration of securities

(a) Method of registration

Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except

that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this subchapter. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) Registration fee

(1) Fee payment required

At the time of filing a registration statement, the applicant shall pay to the Commission a fee at a rate that shall be equal to $92 per $1,000,000 of the maximum aggregate price at which such securities are proposed to be offered, except that during fiscal year 2003 and any succeeding fiscal year such fee shall be adjusted pursuant to paragraph (2).

(2) Annual adjustment

For each fiscal year, the Commission shall by order adjust the rate required by paragraph (1) for such fiscal year to a rate that, when applied to the baseline estimate of the aggregate maximum offering prices for such fiscal year, is reasonably likely to produce aggregate fee collections under this sub-

section that are equal to the target fee collection amount for such fiscal year.

(3) Pro rata application

The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(4) Review and effective date

In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of Title 5. An adjusted rate prescribed under paragraph (2) and published under paragraph (5) shall not be subject to judicial review. An adjusted rate prescribed under paragraph (2) shall take effect on the first day of the fiscal year to which such rate applies.

(5) Publication

The Commission shall publish in the Federal Register notices of the rate applicable under this subsection and under sections 78m(e) and 78n(g)[1] of this title for each fiscal year not later than August 31 of the fiscal year preceding the fiscal year to which such rate applies, together with any estimates or projections on which such rate is based.

(6) Definitions

For purposes of this subsection:

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[1] See References in Text note below.

(A) Target fee collection amount

The target fee collection amount for each fiscal year is determined according to the following table:

2002	$377,000,000
2003	$435,000,000
2004	$467,000,000
2005	$570,000,000
2006	$689,000,000
2007	$214,000,000
2008	$234,000,000
2009	$284,000,000
2010	$334,000,000
2011	$394,000,000
2012	$425,000,000
2013	$455,000,000
2014	$485,000,000
2015	$515,000,000
2016	$550,000,000
2017	$585,000,000
2018	$620,000,000
2019	$660,000,000
2020	$705,000,000
2021 and each fiscal year thereafter.	An amount that is equal to the target fee collection amount for the prior fiscal year, adjusted by the rate of inflation.

(B) Baseline estimate of the aggregate maximum offering prices

The baseline estimate of the aggregate maximum offering prices for any fiscal year is the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during such fiscal year as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget, using the methodology required for projections pursuant to section 907 of Title 2.

(c) Time registration effective

The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b) of this section.

(d) Information available to public

The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) Emerging growth companies

(1) In general

Any emerging growth company, prior to its initial public offering date, may confidentially submit to the Commission a draft registration statement, for confidential nonpublic review by the staff of the Commission prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the Commission not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in section 230.433(h)(4) of title 17, Code of Federal Regulations, or any successor thereto.

(2) Confidentiality

Notwithstanding any other provision of this subchapter, the Commission shall not be compelled to disclose any information provided to or obtained by the Commission pursuant to this subsection. For purposes of section 552 of Title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Information described in or obtained pursuant to this subsection shall be deemed to constitute confidential information for purposes of section 78x(b)(2) of this title.

3. 15 U.S.C. 77g provides:

Information required in registration statement

(a) Information required in registration statement

(1) In general

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A of section 77aa of this title, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B of section 77aa of this title; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named

as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(2) Treatment of emerging growth companies

An emerging growth company—

(A) need not present more than 2 years of audited financial statements in order for the registration statement of such emerging growth company with respect to an initial public offering of its common equity securities to be effective, and in any other registration statement to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period pre-

sented in connection with its initial public offering; and

(B) may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Registration statement for blank check companies

(1) The Commission shall prescribe special rules with respect to registration statements filed by any issuer that is a blank check company. Such rules may, as the Commission determines necessary or appropriate in the public interest or for the protection of investors—

(A) require such issuers to provide timely disclosure, prior to or after such statement becomes effective under section 77h of this title, of (i) information regarding the company to be acquired and the specific application of the proceeds of the offering, or (ii) additional information necessary to prevent such statement from being misleading;

(B) place limitations on the use of such proceeds and the distribution of securities by such issuer until the disclosures required under subparagraph (A) have been made; and

(C) provide a right of rescission to shareholders of such securities.

(2) The Commission may, as it determines consistent with the public interest and the protection of investors, by rule or order exempt any issuer or class of issuers from the rules prescribed under paragraph (1).

(3) For purposes of paragraph (1) of this subsection, the term "blank check company" means any development stage company that is issuing a penny stock (within the meaning of section 78c(a)(51) of this title) and that—

(A) has no specific business plan or purpose; or

(B) has indicated that its business plan is to merge with an unidentified company or companies.

(c) Disclosure requirements

(1) In general

The Commission shall adopt regulations under this subsection requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security.

(2) Content of regulations

In adopting regulations under this subsection, the Commission shall—

(A) set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate comparison of such data across securities in similar types of asset classes; and

(B) require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including—

(i) data having unique identifiers relating to loan brokers or originators;

(ii) the nature and extent of the compensation of the broker or originator of the assets backing the security; and

(iii) the amount of risk retention by the originator and the securitizer of such assets.

(d) Registration statement for asset-backed securities

Not later than 180 days after July 21, 2010, the Commission shall issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security (as that term is defined in section 78c(a)(77)[1] of this title) that require any issuer of an asset-backed security—

(1) to perform a review of the assets underlying the asset-backed security; and

(2) to disclose the nature of the review under paragraph (1).

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[1] See References in Text note below.

4. 15 U.S.C. 77h provides:

Taking effect of registration statements and amendments thereto

(a) Effective date of registration statement

Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) Incomplete or inaccurate registration statement

If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days

after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) of this section or upon the date of such declaration, whichever date is the later.

(c) Effective date of amendment to registration statement

An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) Untrue statements or omissions in registration statement

If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop

order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order, the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) Examination for issuance of stop order

The Commission is empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d) of this section. In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Notice requirements

Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement,

properly directed in each case of telegraphic notice to the address given in such statement.

5. 15 U.S.C. 77k provides:

Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a

statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had

taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a

report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the state-

ments therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the

security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the pay-

ment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 29 2014
OFFICE OF THE CLERK

No. 13-435

IN THE SUPREME COURT OF THE UNITED STATES

OMNICARE, INC., et al.,
Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, et al.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF AMICUS CURIAE OF AARP IN SUPPORT OF RESPONDENTS

JAY E. SUSHELSKY*
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2060
jsushelsky@aarp.org
**Counsel of Record*

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Statement of Interest of Amicus Curiae[1]

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is greatly concerned about fraudulent, deceptive and unfair business practices, many of which disproportionately harm older people and disrupt their retirement security. AARP thus supports laws and public policies designed to protect older people from such business practices, including supporting laws regulating corporate disclosures, such as Section 11 of the Securities Act of 1933 ("Section 11"). Among these activities, AARP advocates to uphold the standards by which those harmed may pursue judicial relief.

The ruling in this case will affect a significant percentage of the population AARP fights to protect. Pension funds constitute a very important segment of the investing public in the United States markets, managing essential assets for the age fifty and older population. AARP advocates to preserve the integrity

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of amicus briefs and have filed letters reflecting their blanket consent with the Clerk of the Court.

of standards that apply to corporate disclosures, and takes special interest in this case relating to securities issuers' registration statements which are broadly disseminated and broadcast pursuant to requirements of the securities laws. AARP believes that the standards for disclosure in this context should be demanding, in keeping with Section 11's imposition of strict liability on issuers of registration statements. AARP also believes it is important to prevent lenient disclosure standards from taking root in any area of consumer law because older people are especially vulnerable to fraudsters and con artists.

Introduction and Summary of Argument

Willful blindness, recklessness, or negligence must constitute actionable failures of due diligence for corporate actors making statutorily mandated filings with government entities. Petitioners' brief portrays the $6.22 billion Omnicare[2] as an innocent victim that is simply trying to be forthcoming in the statements contained in its company prospectus. Such a depiction is disingenuous, and not compelling.

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, imposes a diligence standard on public issuers so as to not mislead the public. The standard does not constrain companies from making reasonable business forecasts in Registration Statements; but it does require them to inform the

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[2] Key Statistics of Omnicare, Inc. (OCR), Yahoo Finance, yhoo.it/1qk9pzm (last visited August 27, 2014) (market capitalization at $6.22 billion; yearly net revenue at $6.23 billion).

public of the factual bases for their statements if the forecasts otherwise are likely to mislead. Because members of the public are in a position of vulnerability, the securities statutes and the SEC's regulatory and enforcement agenda are in place to ensure that quality information is disseminated. *See* U.S. Sec. and Exchange Comm., *The Investors Advocate: How The SEC Protects Investors Maintains Market Integrity, And Facilitates Capital Formation*, http://1.usa.gov/WM2PYF (last visited Aug. 28, 2014) (noting that the SEC's mission is to "protect investors, [and] maintain fair, orderly, and efficient markets").

Petitioners' posture amounts to an attempt to subvert strict liability of Section 11 through erroneous reliance on the distinction between fact and opinion. This position is untenable. The characterization of a statement as an opinion rather than a fact itself requires careful consideration of the speaker's mental state. Petitioners' view would thwart the overriding concern for a strict liability objective standard of materiality in Section 11. It also would have absurd consequences in other areas where materiality is a relevant factor in determining whether there has been unlawful deception, such as in consumer law or contract law. Under Petitioners' view, an act of calculated, willful blindness or procedural negligence could escape Section 11's reach, despite its likely harmful effect. Furthermore, because of the higher burden of proof Petitioners' position would impose on plaintiffs, the rule for which Petitioners contend would deprive litigants of compelling claims seeking redress for an issuer's

unreasonable actions. The Court should reject Petitioners' proposed rule.

Argument

I. Section 11 Requires Companies To Act Reasonably and Responsibly.

Omnicare, a fortune 500 company, is the nation's largest provider of pharmaceutical care services for millions of elder patients in nursing and assisted living facilities across the U.S. and Canada. J.A. 180-81; Corporate Profile of Omnicare, Inc. (OCR), Yahoo Finance, yhoo.it/VSGHuc (last visited August 28, 2014). Notably, Omnicare "is the largest U.S. provider of professional pharmacy, related consulting and data management services for skilled nursing, assisted living and other institutional healthcare providers as well as for hospice patients in homecare and other settings." *Omnicare Reports Third Quarter Results*, BusinessWire.Com (Oct. 30, 2008 8:00 AM EDT), http://bit.ly/1oC4yK9.

Amicus submits that Omnicare, which boasts that it is "the market leader in professional pharmacy, related consulting and data management services for skilled nursing, assisted living and other chronic care institutions,"[3] should similarly be a

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[3] *See* Omnicare, Corporate Profile, Omnicare.com, bit.ly/1pLALPW (last visited Aug. 27, 2014) (characterizing itself as "the market-leader in professional pharmacy, related consulting and data management services for skilled nursing, assisted living and other chronic care institutions, Omnicare leverages its unparalleled clinical insight into the geriatric

leader in its standard of compliance with public securities issuers' disclosure standards. Yet Omnicare purports to be naïve about the appropriate manner to make reasonable inquiry and disclosure as to its level of legal compliance in its operations. Petitioners argue that the Sixth Circuit ruling is wrong because the ruling would lead to a company being held liable for making a legal prediction which turns out, in "hindsight," to be wrong. Br. of Pet'rs 33-36, *Omnicare v. Laborers*, No. 13-435, 2014 U.S. S. Ct. LEXIS 94. This is not the Sixth Circuit ruling. Petitioners' argument fails to address the important Section 11 policy that statements must be *materially misleading* to be the basis of liability. *See Omnicare, Inc., v. Laborers Dist. Coun. Construction Ind. Pension Fund*, 719 F.3d 498, 501 (6th Cir. 2013) ("Section 11 provides a remedy for investors who have acquired securities under a registration statement that was materially misleading or omitted material information."). Under the ruling, a company may be liable only when it acts unreasonably, such as when it makes an ill-founded statement about its legal compliance without disclosing facts necessary to prevent the statement from misleading potential investors. 15 U.S.C. § 77k(a) (liability if the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading").

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market along with some of the industry's most innovative technological capabilities to the benefit of its long term care customers.")

A. Disclosure of Adequate Factual Bases for Opinions is Required Under Section 11.

Section 11 requires corporations to disclose adequate factual bases for statements of legal compliance. Section 11 was enacted with the "essential purpose [of] protecting investors." *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40 (1941); *accord, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 571-72 (1995). The Securities and Exchange Act was "designed to provide investors with full disclosure of material information concerning public offerings of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976).

Incorrect statements of opinion can falsely imply that the speaker has a reasonable basis for his views. *See* Br. of Resp'ts 26-28, *Omnicare v. Laborers*, No. 13-435, 2014 US. S. Ct. LEXIS 94 (demonstrating the common law has recognized such); *see also* Dean W. Page Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1240 (1976) (noting even proponents of the view that opinions should not be actionable as defamation require that "the publisher set forth the basis of the opinion expressed"). Under Section 11, when a corporation "chooses to reveal relevant, material information [whether voluntarily or as required] it must disclose the whole truth." *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 26 (1st Cir. 1987); *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 657 (S.D.N.Y 2004) (noting the SEC regulations provide that in addition to expressly required information in a registration statement, a filer must add such further information as is

necessary to make the required statements not misleading). Omnicare elected to make statements about its legal compliance in regards to its contractual relationships with pharmaceutical suppliers and healthcare providers in several places throughout its registration materials without disclosing facts necessary for potential investors to understand the company's legal risk. *See e.g.* J.A. ¶ 95, 137. The high investor protection standards imposed by Section 11 do not support Petitioners' position that Omnicare is relieved of legal review because the statement was in the form of a belief.

Section 11 imposes rigid standards of diligence upon companies to provide accurate information in filing their registration statements. 15 U.S.C.S. § 77k(a) (excluding need for plaintiffs to prove scienter); *Herman & Maclean v. Huddleston*, 459 U.S. 375, 381-382 (1983) ("The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering.") Such diligence requires a company to conduct proper inquiry into statements of legal compliance. Statements made in registration statements must not be made negligently, recklessly or through willful blindness. *Id.* Omnicare has the obligation to ensure when it stated its "belief" about its legal compliance, it did not do so negligently.

B. Petitioners Were Required to Perform the Proper Inquiry and Analysis Prior to Undertaking to Make the Disclosures Pertinent Here.

Omnicare has no justification for not verifying its legal compliance, especially once it elected to encourage investors on the basis of that information. *See id.*; *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090 (1991) (materiality based on impact on potential shareholders). In fact, Omnicare was required not only by Section 11, but also by reason of its participation in Medicare and Medicaid, to conduct a proper analysis of its legal compliance in regard to the Federal Anti-Kickback Statute, one of the laws Omnicare allegedly violated at the time of making the registration statements. *See* Third Am. Complaint ¶ 50, J.A. at 206. Omnicare is well accustomed to inquiries into its legal compliance, having been entangled in numerous lawsuits regarding unlawful behavior. For example, in the past decade Omnicare settled a False Claims Act allegation of accepting kickbacks from drug giant Johnson & Johnson and defrauding state funded Medicaid programs. *See United States ex rel. Quinn v. Omnicare, Inc.*, 382 F.3d 432 (3rd Cir. 2004) (allegations included Omnicare misrepresentations to Medicaid that "medications were destroyed when they, in fact, had been returned and redispensed").[4]

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[4] *See also* Jesse Greenspan, *Omnicare Settles Fraud Charges For $49.5 Million*, Law360 (Nov. 14, 2006, 12:00AM), *available at* http://bit.ly/1qHAqQw (noting that leading provider of pharmaceutical care for the elderly, Omnicare, agreed to pay

More recently, other accusations of Omnicare wrongdoing have been brought by the U.S. Securities and Exchange Commission and the U.S. Department of Justice. *See e.g.* Terry Baynes, *Omnicare to pay $120 million to settle U.S. kickback lawsuit*, Reuters (Oct. 23, 2013, 6:56 PM), bit.ly/1rBSuvS (2013 $120 million S.E.C. settlement of accusations of giving nursing homes heavily discounted drugs in exchange for patient referrals); Drew Armstrong, *Omnicare CEO Figueroa Resigns After 18 months In The Job*, Bloomberg (Apr. 16, 2012, 4:12 PM), http://bloom.bg/UxNo4D (2012 $50 million D.O.J. settlement of accusations of illegally dispensing medicine to residents of nursing facilities); U.S. Dep't of Justice,, *Nation's Largest Nursing Home Pharmacy Company to Pay $124 Million to Settle Allegations Involving False Billings to Federal Health Care Programs*, Press Release (June 25, 2014), 1.usa.gov/1qaxvyy (2014 $124 million D.O.J. settlement of accusations of offering improper financial incentives to skilled nursing facilities in exchange for drug supply). Omnicare's tendency towards non-compliance with federal regulation and other unlawful conduct even resulted in the closure of one of its most prominent drug repackaging facilities. *See* Anna Lewcock, *FDA pulls up Omnicare on quality violations*, In-PharmaTechnologist, (Feb. 13, 2007), bit.ly/1tOsQl8.

Despite Omnicare's abundant past compliance travails, Petitioners argue that for them to disclose

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nearly $50 million in 2006 "to the federal government and 42 states to settle allegations that it overcharged Medicaid").

the facts necessary to make the company's legal compliance opinion reasonable would be an impossible burden because "the government may interpret the law differently." Br. of Pet'rs 33-36. Petitioners' argument does not properly address the allegations against them. Petitioners argue as if accounting for uncertain future regulation is as unpredictable as accounting for a future lawsuit based on currently illegal behavior. *Id.* at 36 (arguing that similar to determining the uncertainty of future regulation, it is impossible to know whether the company "might be sued."). The chance that business regulation may change is inherent to running a business, which is not this case. *See Levin v. Hunter Envtl. Servs. (In re Hunter Envtl. Servs.)*, 921 F. Supp. 914, 920-21, n.14 (D. Conn. 1996) (potential investors not misled because company did not get certain permits; government regulation listed as an "inherent risk" for the business). Here, Omnicare allegedly had already violated existing law and reported erroneous "speculations" about whether it would get caught. Third Am. Complaint ¶¶ 48-90. The fact finder should determine whether the statement was misleading, taking into consideration the context of the statement of legal compliance. Certainly, the disclosure of risks associated with a statement of legal compliance could have helped with Omnicare's defense. *See Levin*, 921 F. Supp. at 921 (holding statements clearly immaterial because company gave far more than a "blanket warning" about the uncertainty of the government decision making process). Omnicare did not make disclosures adequate to escape judicial review under Section 11.

C. Members of the Public Have the Right to Rely on Company Representations.

Deceitful language in company statements harms the investing public, including pension plans and plan beneficiaries. When making investment decisions, pension fund investors are charged with a high standard of fiduciary duty to plan members. Restatement (Second) of Trusts 2d § 2, comment b (1959); *Tatum v. RJR Pension Investment Committee*, No. 13-1360, 2014 U.S. App. LEXIS 14924 at *17 (4th Cir. Aug. 4, 2014) ("The fiduciary obligations of the trustees to the participants and beneficiaries of [an ERISA] plan are . . . the highest known to the law," *quoting Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). Under the Employee Retirement Income Security Act ("ERISA"), fiduciaries must "engage in a reasoned decision-making process, consistent with that of a 'prudent man acting in like capacity,' 29 U.S.C. § 1104(a)(1)(B)." *Difelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007). Fiduciaries must act prudently, but they need not follow a procedural checklist when investigating potential investments. *Tatum*, 2014 U.S. App. LEXIS 14924, at *24. The ERISA reasonableness standard imposed on fiduciaries, in essence, requires one to "appropriately investigate the merits of an investment decision prior to acting." *Id.* at 25.

Section 11 standards should interact consistently with the standards imposed on readers of the statements. Under Petitioners' view, a fiduciary would never have the right to rely on a statement of belief in a registration statement. By

rendering every statement of belief immaterial, a fiduciary would have to treat them as completely valueless. In other words, if a jury ruled the statement objectively false and likely to deceive a reasonable potential shareholder, Petitioners' position holds that as long as the statement was not subjectively false, the reader has no right to rely on it. Yet, suppose a fiduciary of a plan relied on the statements of belief, invested as a result, causing harm to the plan. Because the ERISA standards imposed on the fiduciary are based on objective reasonableness, the fiduciary could claim that she acted reasonably to defend against an ERISA plan action against her. Would, then, only the plan beneficiaries suffer the consequences of the deception? Under Petitioners' view, neither the company nor the fiduciary investor is responsible. The harm falls on the plan – in sharp contrast to the outcome that accepted liability analysis would dictate, that the responsibility should fall at the beginning of the stream of commerce. *Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1462 (11th Cir. 1986) ("[Strict liability transfers the] ultimate risk of injury resulting from the product . . . from the injured person (whether purchaser, user, or otherwise) to those parties who put the product in the stream of commerce."); *see also e.g. Wheeler v. John Deere Co.*, 862 F.2d 1404, 1412 (10th Cir. 1988); *Taylor v. Elliott Turbomachinery Co. Inc.*, 171 Cal. App. 4th 564, 576 (2009) (discussing "stream of commerce" strict liability theory, placing the responsibility at the beginning of the product's entry into the marketplace: "Other manufacturers cannot be expected to determine the relative dangers of

various products they do not produce or sell and certainly do not have a chance to inspect or evaluate.").

Omnicare did not intend for its statements of legal compliance to be absolutely meaningless. It wanted readers to rely on the statements and it would derive "personal profit or other benefit" from use of the statements. *See id.* (factor calling for "imposition of strict liability"). Omnicare should be bound by the effects its statements have, as demanded by the strict liability of Section 11. *See* S. Rep. No. 47, 73d Cong., 1st Sess., at 4-5 (1933); H.R. Rep. No. 85, at 9-10 (indicating the burden of the risk of harm from negligently made representations in registration statements should be placed on the party who stands to financially benefit).

II. The Fact-Opinion Distinction Proposed by Petitioners Thwarts Section 11's Overriding Policy to Avoid Inquiry into Corporate Mental State.

Under Petitioners' view, a court must make an initial determination of whether a statement is a fact or an opinion, but that initial inquiry itself erroneously injects subjective inquiry into Section 11 analysis. The distinction between an opinion and a fact is not always black-and-white. Courts have used at least three different methods for analyzing the difference between fact and opinion in securities fraud cases. *See* Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 23 La. L. Rev. 381, 401-407 (2013) (noting courts do not tend to apply a

uniform test).[5] Influential scholars such as Dean Keeton, whose expertise this Court acknowledged in *Virginia Bankshares*, *supra*, hold that the form of the statement alone (such as speaker use of the words "I believe..." or "It is my opinion that...") does not signify an opinion. *See* Keeton, *supra*, at 1233 (characterizing statements of opinions based on the speaker's mental state in forming them); *see also Va. Bankshares*, 501 U.S. at 1094 (indicating the context in which a statement is made influences whether it is a fact or an opinion, *citing* L. Hand, J., *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (CA2 1918)). The Restatement (Second of Torts) § 538A (1977), upon which Petitioners rely as authority for the fact-opinion distinction, Br. of Pet'rs 15-16, actually holds that the speaker's intent is relevant in evaluating whether a statement is an opinion or a fact. Restatement (Second of Torts) § 538A (1977) (speaker belief or judgment required to make a representation an opinion). But Section 11 is intended to avoid just such an inquiry into the speaker's intent, *Herman & Maclean v. Huddleston*, 459 U.S. 375, 382 (1983); see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976) ("Liability against the issuer of a security is virtually absolute."), and the fact-opinion inquiry itself undermines that strict liability policy.

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[5] Couture discusses that courts have used at least three distinct tests to distinguish whether a given proposition is an opinion as opposed to a fact, including a) the "I know it when I see it" test; b) the literal test; and c) the judgment or subjectivity test).

A. Characterizations of Opinion Require Inquiry into the Speaker's Mental State.

The assertion "We believe" does not necessarily turn a statement into an opinion. The following examples, from Professor Couture, *Opinions Actionable as Securities Fraud*, demonstrate how substance should dictate over form when identifying an opinion in the securities fraud context. The following two statements both should be treated as opinions:

> (1) "I believe that the company is well-poised to capture the additional market share vacated by Borders" and (2) "the company is well-poised to capture the additional market share vacated by Borders." The assessment about the company's ability to capture additional market share incorporates the speaker's judgment, regardless of whether it is preceded by the phrase, "I believe." The phrase "I believe" is merely implied in the second statement.

Id. at 410. In contrast, neither of the following two statements, if made by the chairman of the board of directors, should be treated as an opinion:

> (1) "The board met for three hours before voting on the merger"; and (2) "I believe that the board met

> for three hours before voting on the merger." *The mere addition of the qualifying phrase 'I believe' would not transform a statement of fact, which was neither inferred nor evaluative, into a statement of opinion.*

Id. at 411-12, n. 118 *citing* Keeton, *supra*, at 1233 (emphasis added).

In line with the two preceding examples, both under the view of Dean Keeton and under the Restatement (Second) of Torts § 538A (1977), one must consider whether the speaker made a *judgment* or *evaluation* in order to determine a statement of opinion. According to Dean Keeton, *supra*, at 1249-59, opinions are divided into two categories: evaluative and deductive. In an evaluative opinion, "the 'speaker makes a normative judgment based on facts known' to the speaker"; and in a deductive opinion, "the speaker applies his or her 'deductive skills' to a body of facts, thereby 'lead[ing] to the inference of a new fact.'" Couture, *supra*, at 408 (*citing* Ronald K. Chen, *Once More into the Breach: Fact Versus Opinion Revisited After Milkovich v. Lorain Journal Co.*, 1 Seton Hall Const. L. J. 331, 334-37 (1991)). Likewise, Petitioners state that a necessary quality of opinions is that opinions incorporate the speaker's evaluation or judgment. *See* Pet. Brief at 34 (quoting Restatement (Second) of Torts § 538A (1977)). Under each of these characterizations of opinions, the analysis requires consideration of the speaker's mental state – the

speaker's intent to make a judgment. The form of the statement (existence of the words, "I believe") alone does not characterize an opinion.

B. Interpreting Petitioners' Statement of Belief Under Section 11's Materiality and Deceit Standards is a Jury Question.

Omnicare's statement of belief might not be a genuine statement of belief. By examining contexts in which the words "We believe" might play a role other than turning a statement of fact into an opinion, it becomes clear that evaluating the statement requires analysis of scienter. Statements that look like opinions do not always play the role of an opinion – rather, they may be acts of deception, acts of willful blindness, or acts of negligence.

For example, the following are three possibilities as to the intent of Petitioners in using the words "We believe":

a. Petitioners inserted "We believe" to shield them of liability.

This is the case of subjective knowledge that Petitioners argue Respondents must allege. In this situation, Omnicare knew that it made a false statement and it inserted "We believe" so it would not be held accountable for the statement's falsity. Omnicare's statement, in that situation, would not be an opinion. The words "We believe" do not act to signify the speaker's judgment or evaluation about the fact. The words "We believe" act as an insulator

of liability. The statement is, in that case, not an opinion, but a *statement of deception*.

b. Petitioners inserted "We believe" to convince them that they were in legal compliance.

This action is akin to an act of *willful blindness*: an action taken to "deliberately shield[] [oneself] from clear evidence of critical facts that are strongly suggested by the circumstances." *Global-Tech Appliances v. SEB S.A.*, 131 S. Ct. at 2068-69. Suppose Omnicare's legal compliance team began evaluating its legal compliance related to the anti-kickback statute, and once it began to find suspicious information, it discontinued its analysis and inquiry into the facts. In this case, the words "We believe" function as an act of self-deception: a way to justify ending the inquiry. *See* ALFRED KORZYBSKI, SCIENCE AND SANITY, Preface xvi-xvii (5th ed., Institute of General Semantics, 1933) (discussing that the act of verbalizing obscures the thing itself; *i.e.* words are not prior to what underlies them).

c. Petitioners inserted "We believe" to qualify the result of a negligent compliance process.

Suppose Omnicare's legal compliance practice manual requires only that its legal compliance agent inquire into the company legal compliance for two weeks, and the result of that inquiry is deserving of a belief statement of legal compliance in a registration statement. The statement of belief, in that case, would be a result of negligence. Petitioners' theory of the law would allow a company to have such a

negligent policy, which would clearly offend the purpose of Section 11 in imposing diligence standards on a company.

Clearly, a strict liability statute would not allow an actor of willful blindness or negligence to escape liability. Many years ago, criminal law incorporated the doctrine of willful blindness with the rationale that "defendants who behave in this manner are just as culpable as those who have actual knowledge." *Global-Tech Appliances*, 131 S.Ct. at 2068-69 (*citing* J. Edwards, The Criminal Degrees of Knowledge, 17 Mod. L. Rev. 294, 302 (1954). This Court, in applying the doctrine in civil cases for patent infringement, held that, "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts." *Id.* at 2069 (*citing United States v. Jewell*, 532 F.2d 697, 700 (CA9 1976) (en banc)). Strict liability is the most extreme standard of imposing fault. *Ernst & Ernst*, 425 U.S. at 200 (noting Section 11 imposes "express liability regardless of the defendant's fault"). Section 11 requires judicial review in every one of the above scenarios.

The fact-finder must consider objective unreasonableness and materiality. *Va. Bankshares*, *supra*, at 1094-95. Congress, through enacting Section 11's policy of strict liability, imposed diligence standards on companies. H.R. Rep. No. 85, at 9 (1933) (Section 11 places "upon originators of securities a duty of competence as well as innocence which the history of recent spectacular failures overwhelmingly justifies"). Congress has declared

that deceptive statements formed through willful blindness, recklessness and negligence are legally actionable to those harmed as a result. 15 U.S.C. § 77k(b)(3)(B) (burden of due diligence defense placed on defendants). Thus, statements of belief formed under these conditions are not "honest" belief but rather actionable "negligent," "reckless," or "willfully blind" belief. If a company forms a statement of belief under a negligent process, for example, the statement is actionable under *Virginia Bankshares* as a "misstatement of the psychological fact of the speaker's belief," *Va. Bankshares*, 501 U.S. at 1095, because it purports to assert honest belief but actually asserts only a negligent belief. Section 11 cannot immunize a company using a less-than-diligent procedure for forming and asserting beliefs. Because the question of deciphering belief requires intricate factual analysis, the jury must conduct the analysis.

Virginia Bankshares recognizes that the question of how to perceive the statement is for the jury: "'the jury was certainly justified in believing that the directors did not believe a merger at $ 42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e. g.*, retaining their seats on the board.'" *Id.* at 1095 (*quoting Sandberg v. Va. Bankshares, Inc.*, 891 F.2d 1112, 1121 (4th Cir. 1989)). In *Virginia Bankshares*, subjective falsity of the statement was assumed. The Court interpreted the jury verdict "as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed," and it "confin[ed

its] discussion to statements so made." *Id.* at 1090. The jury played an essential role at the trial level in *Virginia Bankshares*, and a jury has the right to interpret the mental state of a speaker in assessing a statement of belief. *See In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d at 658 ("materiality is necessarily a 'fact-specific inquiry' [and thus] courts within the Second Circuit have 'consistently rejected a formulaic approach to assessing the materiality' of misrepresentations," quoting *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) and *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162 (2d Cir. 2000)). Thus, under Section 11, a jury must determine whether Omnicare's statement of belief is actually a negligent misrepresentation of a fact.

III. Diluting Objective Standards in Evaluating Fraud Would Bar Legitimate Claims for Relief.

Materiality is an objective inquiry precisely because the subject of concern is the effect on the audience, not the actor. Scammers may tell themselves they are not doing harm, or they make statements to get people to act, the truth of which may be difficult to determine. For that reason, materiality is an objective standard. Br. of Resp'ts 32 (discussing common law fraud and contract law principles of materiality based on objective standard of right to reliance). For example, the FTC Statement on Deception incorporates an objective standard of materiality, noting, "[t]he basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or

service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception." FTC Policy Statement on Deception, *Statement to Chairman Committee on Energy and Commerce* (October 14, 1983), *available at* 1.usa.gov/1tGQ5P1. Similarly, in *Virginia Bankshares* the Court acknowledged that materiality depends on whether "there is a substantial likelihood that [the audience] would consider it important in [acting on the information]." *Va. Bankshares*, 501 U.S. at 1090 (*citing TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 48 L. Ed. 2d 757, 96 S. Ct. 2126 (1976)); *see also Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Petitioners' view of materiality would undermine consumer protection, as fraudsters and con artists often convince themselves they are providing a service when in fact they are cheating vulnerable consumers.

A. An Objective Standard Is Necessary To Protect Against Fraud.

Rationalization of wrongful behavior is a common trait among scammers, who seek to convince themselves they are not doing harm. *See* The Psychology of the Scam, *Better Business Bureau* (June 29, 2012), http://go.bbb.org/1zEseRP (last visited Aug. 28, 2014) (noting that scammers "rationalize away any concern that they are harming other people with any number of self-delusional discussions."). The same processes that are useful in deceiving others, such as "avoiding the truth, obfuscating the truth, exaggerating the truth, or casting doubt on the truth[,] can also be useful in

deceiving the self." William von Hippel and Robert Trivers, *The evolution and psychology of self-deception*, 34 Behavioral and Brain Sciences 1, 1 (2011). What underlies this tendency is that "people favor welcome over unwelcome information in a manner that reflects their goals or motivations." *Id.*

The nature and aspects of fraudsters' behavior is something to which Amicus is sensitive as older people are especially susceptible to scams. Many scammers who convince themselves they are acting responsibly cause serious harm. In many of the cases of elder financial abuse, the perpetrator actually believes she is acting lawfully because the person convinced herself she is not doing wrong. Adult child perpetrators of elder abuse base their actions on a feeling of entitlement to the parent's funds. Metlife Mature Market Institute, *Study: Broken Trust, Elders, Family and Finances* 10 (Mar. 2009). "'She would want me to have it' is a common excuse." *Id.; see also* Leslie Callaway and Jerry Becker, *Stopping the Financial Abuse of Seniors*, ABA Bank Compliance 12 (July-Aug. 2011) (reporting family members who abuse the elderly act based on a sense of entitlement ("'I'm going to get the money anyway [after mom or dad dies]'"); they see themselves as "'borrowing' from their future inheritance"). The cases in which perpetrators do not comprehend the immorality of their actions are all-too-common. *See id.* (reporting about 60 percent of cases of elder financial abuse reported to adult protective services involved an adult child). A policy of strict liability ensures adequate review of these types of cases by avoiding this inquiry into mental state.

A scammer's belief that she is doing no harm, possibly by purporting to offer a service, is no defense for deceiving and harming others. People who are prone to misrepresent the truth, wittingly or unwittingly, cause great suffering. A whole slew of harmful consumer products exist today, purporting to provide a real service but only leach money from vulnerable people. The Federal Trade Commission fights against a breed of scams called "Last Dollar Scams," "scams [that] involve selling consumers bogus promises of a job, government grant or some other money-making opportunity." Federal Trade Commission, *Last Dollar Scams* 1.usa.gov/1sI1Xxn (last visited Aug. 28, 2014). These include scams that offer fraudulent home-based-business opportunities, bogus credit card interest rate reduction or credit repair schemes, or foreclosure rescue scams. *Id.* Such scams[6] can escape liability under Petitioners' view, where statements that deceive are not legally actionable if they are in the form of opinions ("I believe my product will repair your credit."). A ruling that subjective falsity is an appropriate inquiry would do no justice for a person who faced a con artist whose deceit is clouded in ambiguous language of subjective belief.

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[6] Recent revelations about for-profit colleges provide another example of a scam purporting to offer a product of value but better characterized by fraud. Recent investigations by state attorneys general have revealed that many of these schools are leaving students with loads of debt and valueless degrees. *See* Andy Rosenthal (ed.), *For-Profit Education Scams*, New York Times Editorial (March 23, 2012). "They "account for nearly half of student loan defaults, even though they enroll a little more than 10 percent of higher education students." *Id.*

B. The Burden on Defrauded Plaintiffs Would Be Unreasonably High If Subjective Falsity Becomes an Element of Materiality.

Subjectively false statements purporting to be opinions could escape liability, as long as the company kept the subjective truth hidden. Scammers use language and context [ ] as a form of deception, and they may even deceive themselves into thinking they are providing a service. "Ascertaining honesty in this context is extremely difficult." Keeton, *supra*, at 1245. The inquiry into subjective falsity would put a difficult and sometimes impossible burden on plaintiffs with valid claims. Ascertaining the truth of a speaker's state of mind "presents a difficult issue of fact as well as issues related to the admissibility and relevance of certain kinds of evidence." *Id.* at 1242.

Ascertaining corporate "belief" in litigation is a highly burdensome process. *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 283 (D.N.J. 2007) (noting "scienter[,] based on the defendant's state of mind[,] may be difficult to prove with direct evidence"); *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) ("corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority or have apparent authority to make policy for the corporation"). Proof gets even more complicated when companies outsource their legal compliance work, as Omnicare was doing at the time it made the statement at issue. *See* Julie Schaeffer, *Just What*

Omnicare Ordered, Profile (April/May/June 2014), *available at* http://profilemagazine.com/2014/omnicare/ (reporting Omnicare developed in-house counsel team since 2011, before which the company outsourced most of its legal affairs to private firms). Section 11's strict liability policy is intended to place objective standards of reasonableness on companies in making registration statements. *See* Br. of Resp'ts 44 (discussing the allocation of burdens and defenses Congress placed through Section 11 policy, specifically that the defendant's burden in defense of Section 11 liability requires proof "(a) that he conducted 'a reasonable investigation'; (b) that he 'had reasonable ground to believe'; and (c) that he 'did believe' that the statements were true and not misleading," *quoting* 15 U.S.C. § 77k(b)(3)(B)). Petitioners' view would erect a proof hurdle on Plaintiffs that Congress did not intend in Section 11.

Conclusion

Amicus submits that a subjective falsity pleading requirement under Section 11 is contrary to Congressional intent and would rob that provision of the power to protect investors. Amicus urges the Court to affirm the decision of the Sixth Circuit Court of Appeals that Respondents properly pleaded a cause of action under Section 11 by alleging only that Petitioners' statement of opinion was objectively incorrect.

Respectfully Submitted,

JAY E. SUSHELSKY*
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
(202) 434-2060
jsushelsky@aarp.org
**Counsel of Record*

AMICUS CURIAE BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

OMNICARE, INC., ET AL.,

Petitioners,

v.

THE LABORERS COUNCIL CONSTRUCTION INDUSTRY PENSION FUND AND THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CENTER FOR AUDIT QUALITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CARTER G. PHILLIPS*
MICHAEL D. WARDEN
JONATHAN F. COHN
ERIC D. MCARTHUR
JOSHUA J. FOUGERE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

June 12, 2014

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Audit Quality ("CAQ") is a public policy organization of approximately 750 U.S. public company accounting firms, representing tens of thousands of professionals dedicated to audit quality. Any U.S. accounting firm registered with the Public Company Accounting Oversight Board ("PCAOB") may join the CAQ. The organization strives to increase investor confidence and public trust in the global capital markets by improving the reliability of public company audits and enhancing their relevance for investors. As a part of that effort, the CAQ regularly submits *amicus* briefs in cases concerning legal rules that affect auditors and the audit process, and their broader impact on investors and the capital markets.

This is such a case. The CAQ's member firms audit the financial statements of virtually every public company in the United States, and are often drawn into litigation related to those audits. Claims brought under section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, are no exception. Although this case involves the statement of an issuer, not an auditor, the statute expressly lists "accountants" among the parties subject to liability, *id.* § 77k(a)(4), and auditors are frequently named as defendants in section 11 cases. Auditors' principal task in connection with registration statements is to express an opinion, based on professional judgment, on the issuer's financial

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Petitioners and respondents have filed letters with the Court granting blanket consent to the filing of *amicus curiae* briefs.

statements. The CAQ, therefore, believes that it can provide a valuable perspective on the reach of section 11 and the potential consequences of the Court's resolution of the question presented to the accounting profession.

The issue raised here is fundamental to section 11 litigation and to ensuring that the boundaries of liability under that provision remain where Congress put them. The decision below moved the stakes. Breaking from section 11's text and common-law foundations, the Sixth Circuit erroneously held that a plaintiff can challenge a statement of opinion as an "untrue" statement of material fact without showing that the speaker did not actually hold the opinion expressed—a requirement known as "subjective falsity." This interpretation improperly broadens the scope of liability under section 11 and, if affirmed, would have serious repercussions for the CAQ's members and, ultimately, for users of financial statements and the investing public. The Court should reverse and in the process take care not to disturb case law recognizing that auditors' opinions are precisely that—matters of opinion—and thus cannot be challenged under section 11 absent a showing of subjective falsity.

SUMMARY OF ARGUMENT

Section 11 of the Securities Act creates a cause of action against issuers and other parties based on false statements in, or in connection with, registration statements. Subsection (a) confines liability to "untrue statement[s] of . . . material fact" or omissions. 15 U.S.C. § 77k(a). When a plaintiff targets subjective assertions or statements of opinion, this provision compels every plaintiff to plead and prove that the speaker did not genuinely hold the view expressed, because a subjective statement of opinion

cannot be an "untrue . . . fact" otherwise. Subjective statements of opinion cannot be deemed false statements of fact without proof that they were subjectively false.

This requirement is critical to the auditing profession because the core of an auditor's work is to exercise judgment and express opinions. For registration statements, auditors produce what is called an audit report, the core of which is an opinion about the issuer's financial statements. Embedded within those financial statements and their line items are innumerable estimates, forward-looking projections, and other accounting conclusions that require the exercise of professional judgment. Because numerous material elements of financial statements are inherently judgmental and matters of opinion, in opining that the financial statements taken as a whole are fairly presented in accordance with U.S. generally accepted accounting principles ("GAAP"), an auditor often is effectively expressing an opinion about an opinion. Section 11(a) demands proof of subjective falsity for allegations aimed at such subjective statements.

This conclusion follows not only from the plain text of section 11(a), which demands an "untrue" statement of "fact," but also from the longstanding common-law distinction between fact and opinion. This distinction, which Congress is presumed to have followed in the Securities Act, holds that a statement of opinion may be actionable as a misrepresentation only if the statement misrepresents the speaker's state of mind. A requirement of subjective falsity also is consistent with the approach this Court and others have taken in analogous contexts in which statements of opinion are challenged as false, such as under First Amendment defamation law. And it harmonizes the entire statute, requiring plaintiffs who chal-

lenge a statement of opinion to allege and prove subjective falsity under subsection (a), while requiring professionals sued for objectively false statements of fact to rely on the due-diligence defense in subsection (b)(3).

The usual statutory interpretation tools provide more than enough justification for reversal, but there is another reason to proceed cautiously in the face of the Sixth Circuit's sweeping view of section 11. As this Court has often said, private-plaintiff enforcement of the securities laws imposes significant costs on the economy. That counsels restraint in expanding the scope of section 11 liability here.

Many decisions adjudicating section 11 claims have interpreted the statute correctly. Recognizing the inherently discretionary and judgmental nature of the accounting decisions embedded in financial statements, these courts have required proof of subjective falsity whenever plaintiffs claim that such subjective assertions of judgment are untrue. The Court should not disturb these cases by widening liability beyond what the text of section 11 commands.

ARGUMENT

I. STATEMENTS OF OPINION ARE NOT ACTIONABLE UNDER SECTION 11 UNLESS THE PLAINTIFF CAN PLEAD AND PROVE SUBJECTIVE FALSITY.

1. Section 11(a) provides a private cause of action to certain purchasers of a security sold pursuant to a registration statement that contains "an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Ordinary principles of statutory in-

terpretation make clear that when a plaintiff's claim is premised on subjective statements, the plaintiff must allege and prove subjective falsity—*i.e.*, that the speaker did not genuinely hold the view expressed.

First, that is the plain meaning of the statute's text, which sets forth the dual requirements that there be a statement of "fact" that is provably "untrue." 15 U.S.C. § 77k(a). As this Court has held, subjective beliefs are "open to objection only . . . as a misstatement of the psychological fact of the speaker's belief in what he says." *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1095 (1991). That means that a subjective statement of opinion can be thought of as a "fact" capable of being proven "untrue" only in the sense that "the expression of an opinion is the assertion of a belief, and . . . the expression of a consciously false opinion [is] a consciously false statement of fact." *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (Hand, J.). Subjective falsity, in other words, is a necessary component of any allegation that a subjective statement of opinion was an "untrue . . . fact."

Background principles of common law confirm this reading of the text, and the concomitant scope of the section 11 cause of action. This Court has previously "assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . liability rules and consequently intends its legislation to incorporate those rules." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003); see also *FAA* v. *Cooper*, 132 S. Ct. 1441, 1449 (2012) (when Congress adopts a common law standard, "it presumably knows and adopts the cluster of ideas" associated with it) (internal quotation marks omitted). That presumption applies here.

At the time section 11 was enacted, the common law torts of misrepresentation had long recognized the distinction between "fact" and "opinion." See, *e.g.*, Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 233, 235 (1933); *Legislation; Federal Regulation of Securities: Some Problems of Civil Liability*, 48 Harv. L. Rev. 107, 112 n.33 (1934) ("At common law [a misrepresentation] must pertain to existing or past facts, promises as to the future and opinions being insufficient."). In drawing this line, some courts held that statements reflecting the speaker's state of mind could be considered statements of "fact," *but only if* the allegation were itself about that state of mind, like an allegation that the speaker did not "inten[d] to live up to the representations at the appointed time, or . . . did not entertain an opinion of the kind expressed." Shulman, *supra*, at 237 (citing cases). Such statements were treated as "misrepresentations of the defendant's present intention, of his present state of mind—a fact." *Id.* at 237–38; see also *Vulcan Metals*, 248 F. at 856. Today, too, the common law continues to distinguish between fact and opinion. See, *e.g.*, W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 109, at 755 (5th ed. 1984) (a statement of opinion is a statement of "the fact of the belief, the existing state of mind, of the one who asserts it").

Section 11 incorporates these rules. Not only is Congress "understood to legislate against a background of common-law . . . principles," but "courts may take it as given that Congress has legislated with an expectation that the principle[s] will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). No such contrary purpose is evident in section 11: although the statute "departs

from the common-law civil liability" in "several important particulars," the contours of liability for "untrue" statements of "fact" is not one of them. Shulman, *supra*, at 248–49. Myriad contemporaneous authorities recognized as much. See, *e.g.*, William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 190 n.97 (1933) (listing among the defenses to an alleged section 11 violation that the untruth or omission "involved opinion rather than facts"); *Legislation*, 48 Harv. L. Rev. at 112 n.33 ("[t]he [common-law] definition of a misrepresentation seems to remain unchanged"); Emily Marx, Comment, *Civil Liability for Misstatements in Documents Filed Under Securities Act and Securities Exchange Act*, 44 Yale L.J. 456, 458 (1935) ("Section 11(a) retained several defenses familiar to the common-law deceit action[, including] that the untruth related not to 'fact' but to 'opinion'"); Comment, *Civil Liability Under the Federal Securities Act*, 50 Yale L.J. 90, 93 (1940) ("while the Act has modified or eliminated certain of the prerequisites to recovery at common law, the prospective plaintiff must still be able to show . . . that [the representation] is of fact rather than an opinion").

The scope of liability for allegedly "untrue" statements of material "fact" under section 11(a) thus extends only to factual averments that the plaintiff can prove to be untrue. For allegations that concern the speaker's subjective state of mind, such proof must include a contention that the speaker did not genuinely hold the belief or opinion expressed.

2. This reading of section 11 is also consistent with the law in other contexts. The First Amendment, for example, demands that certain plaintiffs prove that an allegedly defamatory statement was materially false. *E.g.*, *Air Wis. Airlines Corp.* v. *Hoeper*, 134 S.

Ct. 852, 861 (2014); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988); *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775 (1986). An action cannot proceed based on an allegedly false "statement of opinion" because subjective assertions are not statements of defamatory fact that can be proven false. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 19–22 & n.7 (1990). Rather, liability may attach only if the speaker's statement "contain[s] a provably false factual connotation," *id.* at 20, and thus is in effect a false statement of fact.

Case law interpreting the False Claims Act, 31 U.S.C. §§ 3729–3733, is similar. The Act attaches liability to certain "false or fraudulent claim[s] for payment or approval," or to "false record[s] or statement[s] material to a false or fraudulent claim." *Id.* § 3729(a)(1)(A)–(B). Courts have repeatedly held that "'[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false.'" *United States ex rel. Jones* v. *Brigham & Women's Hosp.*, 678 F.3d 72, 87 (1st Cir. 2012); see also *United States ex rel. Riley* v. *St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004). Likewise, to be actionable, the "facts" underlying subjective assertions like estimates must be "reasonably classif[iable] as true or false," rather than unverifiable assertions like "legal argumentation and possibility." *United States ex rel. Siewick* v. *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1378 (D.C. Cir. 2000); see also *United States ex rel. Yannacopoulos* v. *Gen. Dynamics*, 652 F.3d 818, 833–34 (7th Cir. 2011); *United States ex rel. Owens* v. *First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 732–33 (4th Cir. 2010); *Luckey* v. *Baxter Healthcare Corp.*, 183 F.3d 730, 732 (7th Cir. 1999);

United States ex rel. Lamers v. *City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999).

In both the First Amendment and False Claims Act contexts, therefore, a plaintiff's ability to allege that subjective assertions are "false" is sharply limited. If liability is to attach at all, subjective falsity is required. The same is true under section 11.

3. That section 11 is in certain respects a strict liability provision does not undermine this interpretation, and the Sixth Circuit was wrong to hold otherwise. Pet. App. 15a–19a. As already explained, the speaker's subjective state of mind goes to the truth or falsity of the statement itself—that is what makes it a "fact" that can be proven "untrue." Scienter is a separate requirement. See, *e.g.*, *Fait* v. *Regions Fin. Corp.*, 655 F.3d 105, 112 n.5 (2d Cir. 2011) (the need for subjective falsity under section 11(a) "does not amount to a requirement of scienter"); *Hustler Magazine*, 485 U.S. at 52 (public figure defamation plaintiffs must "prove *both* that the statement was false and that the statement was made with the requisite level of culpability"); 15 U.S.C. § 78u-4(b)(1)–(2) (listing separate pleading requirements for an alleged untrue statement of material fact and required state of mind).

Indeed, common-law principles incorporated into the statute lay bare the error below. "[L]iability under Section 11 is modelled after that in rescission." Shulman, *supra*, at 250. And even though "[s]cienter . . . is foreign to the vocabulary of § 11 [and] common law rescission," a rescission action still "distinguish[es] between a statement of 'fact' on the one hand and an expression of 'opinion' or a 'forecast' or a statement of 'law' or 'value' on the other." 9 L. Loss & J. Seligman, *Securities Regulation* 4119, 4267 (3d ed. 2004); see also Shulman, *supra*, at 231–33. The ab-

sence of a scienter requirement thus says nothing about whether and when a section 11 plaintiff must plead and prove subjective falsity.

II. RECOGNIZING THE NEED TO PROVE SUBJECTIVE FALSITY FOR MATTERS OF OPINION IS CONSISTENT WITH THE HISTORICAL ROLE OF AUDITORS AND WITH SECTION 11.

Auditors issue opinions. In registration statements, those opinions reflect the auditor's judgment about the issuer's financial statements and about the sufficiency of the audit procedures performed and the audit evidence gathered. The financial statements about which auditors opine contain not only assertions of objective fact, but also innumerable estimates, projections, and other subjective accounting conclusions that are matters of opinion based on the exercise of professional judgment and discretion. Thus, in opining that the audit client's financial statements as a whole are fairly presented in accordance with GAAP, auditors are required to form their own opinions regarding management's opinions. In other words, application of accounting principles to line items within the financial statements is inherently a matter of judgment and opinion, and then auditors apply their own judgment and issue their own opinion on those financial statements. The form of the auditor's report as that of an opinion reflects this relationship.

Section 11 accounts for the difference between fact and opinion, setting out different pleading requirements and burdens of proof for each. When the alleged untrue statement of material fact identified by the plaintiff pertains to a matter of judgment and opinion, as it often does, the plaintiff must allege and prove subjective falsity. When the alleged untrue statement of material fact pertains to a matter that is

nonjudgmental and objectively determinable, subjective falsity need not be shown to state or prove a claim, but an auditor may still have a due-diligence defense under subsection (b)(3). Many courts have correctly interpreted section 11 to enforce this distinction, and their decisions should not be disturbed.

A. The Bulk Of Auditors' Work In Connection With Registration Statements Is And Always Has Been To Issue Opinions Based On Their Exercise Of Professional Judgment.

A company seeking to offer securities for public sale generally must file a registration statement with the Securities and Exchange Commission. 15 U.S.C. §§ 77e, 77f. Registration statements, in turn, must include certain financial statements "certified by an independent public or certified accountant." *Id.* §§ 77g(a)(1), 77aa(25)–(27). That independent assessment serves a critical function, telling investors that, among other things, the company's financials are presented fairly in all material respects in conformity with GAAP. *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 811, 817–19 (1984). Importantly, though, the market knows and expects that the accountant or auditor carries out this function by furnishing an "opinion." *Arthur Young*, 465 U.S. at 811; see also 17 C.F.R. § 210.1–02(f) ("certified" "means examined and reported upon with an opinion expressed by an independent public or certified public accountant"); *Bily* v. *Arthur Young & Co.*, 834 P.2d 745, 750–51 (Cal. 1992).

This understanding of the auditor's role predates section 11. In the early 1930s, at the same time the Securities Act was being debated and drafted, accountants and regulators came together to develop a standardized way of reporting auditors' work to in-

vestors. See Am. Inst. of Accountants, *Audits of Corporate Accounts: Correspondence between the Special Committee on Co-operation with Stock Exchanges of the American Institute of Accountants and the Committee on Stock List of the New York Stock Exchange*, at 2 (1932–1934). Throughout the process, accountants consistently "emphasize[d] the fact that accounts, and consequently any statements or reports based thereon, are necessarily in large measure expressions of opinion" and thus that "the words 'in our (my) opinion' should always be embodied" in any audit report. *Id.* at 25; see also *id.* at 5 (financial statements "are largely the reflection of individual judgments"). Regulators were "heartily in favor" of a proposal making that clear. *Id.* at 27–31. The upshot was an agreed-upon declaration of opinion from accountants—known as an audit report—which became a mandatory part of companies' stock market filings. *Id.* at 2, 12; see also, *e.g.*, 17 C.F.R. §§ 210.1–01, 210.1–02.

Still today, registration statements and other SEC filings include audit reports, and the fundamentally subjective nature of those reports remains unchanged. The end product of the auditor's work is, first and foremost, "an expression of opinion" as to whether the company's "financial statements, taken as a whole," are in material compliance with GAAP. PCAOB AU §§ 110.01, 508.04 (interim audit standards); *Arthur Young*, 465 U.S. at 811. In addition, since the enactment of the Sarbanes-Oxley Act, audit reports now express the auditor's opinion that the audit of an issuer was conducted in accordance with PCAOB auditing standards, which adopted and since modified generally accepted auditing standards ("GAAS"). *E.g.*, PCAOB AU § 150; 17 C.F.R. §§ 210.1–02, 210.2–02. These core statements about compli-

ance with GAAP and GAAS each reflect the exercise of professional judgment, both as to the ultimate conclusions and as to the innumerable discretionary accounting and auditing judgments that underlie those conclusions.

As for GAAP, this Court has acknowledged the complexity of accounting principles and the professional judgment needed to apply them: "Financial accounting is not a science. It addresses many questions as to which the answers are uncertain and is a 'process [that] involves continuous judgments and estimates.'" *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995); see PCAOB AU § 342.16 (appendix listing "examples of accounting estimates that are included in financial statements"). Many of those financial statement estimates made under GAAP are forward-looking in nature. To take a seemingly simple example, a seller of products with a right of return may recognize revenue at the time of sale of its products only if, among other things, "[t]he amount of future returns can be reasonably estimated." Fin. Accounting Standards Bd., *Accounting Standards Codification* § 605-15-25-1(f) (2014). Whether and when an estimate of future returns is reasonable is a matter of judgment. At bottom, "'[g]enerally accepted accounting principles' . . . tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management." *Thor Power Tool Co.* v. *Comm'r*, 439 U.S. 522, 544 (1979). Even respondent realizes that "[a]ccounting rules often require the exercise of judgment," and that auditors present their work in an "'audit opinion.'" Br. in Opp. to Pet. for Cert. at 20.

Likewise, the auditor's statement that an audit complies with GAAS is an inherently subjective representation infused with the exercise of professional

judgment, predictions of future events, and concepts of reasonableness. "The auditor must plan and perform audit procedures to obtain sufficient appropriate audit evidence to provide a *reasonable basis* for his or her opinion." PCAOB AS No. 15.4 (emphasis added). Because of the nature of audit evidence, an audit provides reasonable, not absolute, assurance that financial statements are free of material error. For example, auditors often engage in sampling as part of their test work, examining less than 100 percent of the transactions that comprise a particular financial statement line item. PCAOB AU § 350. But sampling "require[s] that the auditor use professional judgment in planning, performing, and evaluating a sample and in relating the evidential matter produced by the sample to other evidential matter when forming a conclusion." *Id.* § 350.03. Likewise, many of the judgments made and procedures performed by auditors under GAAS are forward-looking in nature. When auditing revenue of a seller of product with a right of return, an auditor may "[d]evelop an independent expectation of the estimate [of future returns] to corroborate the reasonableness of management's estimate." *Id.* § 342.10. Overall, whether the auditor has "obtain[ed] sufficient appropriate evidential matter to provide him or her with a reasonable basis for forming an opinion" is a subjective determination that fundamentally "involves judgment." *Id.* § 230.11; see also PCAOB AS No. 15. Assessments like these permeate PCAOB auditing standards and GAAS. See, *e.g.*, *In re Lehman Bros. Sec. & Erisa Litig.*, 799 F. Supp. 2d 258, 299–303 (S.D.N.Y. 2011).

For as long as the Securities Act has been in force (and before), the accounting profession, the financial markets, and the law have all recognized the judg-

mental and discretionary nature of audit work. That understanding should not be unsettled now.

B. Section 11 Protects Auditors' Historical Responsibility To Issue Opinions.

Although this case involves the statement of an issuer about legal compliance, and not an auditor's report on its client's financial statements, the Court's interpretation of section 11 should be informed by the fact that auditors are often sued based on matters of accounting and auditing judgments that, like assertions of legal compliance, ultimately are subjective statements of opinion resting on the exercise of professional judgment.

Section 11 protects auditors' historical responsibility to issue opinions without exposing them to expansive liability risks for the inherently subjective judgments they are required to make. Subsection (a) supplies a cause of action for "an untrue statement of a material fact" in a registration statement. 15 U.S.C. § 77k(a). Accountants are implicated if they are named with their consent as having "prepared or certified" any part of the registration statement, or any report or valuation used in connection with it, that contains such an alleged untrue statement. *Id.* § 77k(a)(4). Auditors make such statements through their audit reports. 17 C.F.R. §§ 210.1–02(d), 210.2–02. Subsection (b)(3) then provides an affirmative defense if the auditor "had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true." 15 U.S.C. § 77k(b)(3).

Read together, these two provisions both play an important role in addressing potential liability under the Act. Initially, subsection (a) ensures that the

plaintiff's allegations concern "facts" that can be proven "untrue," and screens out claims that fail to meet that threshold requirement. When the alleged untrue statement of material fact identified by the plaintiff concerns subjective opinions and matters of judgment—as it frequently does—those prerequisites necessitate an allegation of subjective falsity in order to move forward.

Subsection (b)(3), in turn, requires an auditor or other expert who certified a part of the registration statement to prove due diligence as an affirmative defense when the alleged untrue statement of material fact concerns a nonjudgmental, objectively determinable fact. That is, if the plaintiff can demonstrate the falsity of the alleged untrue statement through "[p]rovable facts," *Va. Bankshares*, 501 U.S. at 1093, and "objective evidence" "susceptible of being proved true or false," *Milkovich*, 497 U.S. at 21, the plaintiff need not plead and prove subjective falsity under subsection (a). See *Fait*, 655 F.3d at 110 (plaintiffs need not allege subjective falsity when they can prove that a complained-about statement was false by reference to "an[] objective standard" because in that case the statement is one of fact).

The Sixth Circuit misconstrued the statute, however, by in effect holding that subsection (b)(3) is the only mechanism for considering the defendant's state of mind. That categorical view must be rejected. Properly construed, subsections (a) and (b)(3) both play an important and distinct role, with subsection (a) maintaining the distinction between fact and opinion, and thus weeding out challenges to statements of opinion unless the plaintiff can allege and prove subjective falsity, and subsection (b)(3) affording an affirmative defense when the allegedly false statement is one of objective fact. See Shulman, *supra*, at 251

(recognizing that the "defense[] that the statement referred to opinion rather than fact" (subsection (a)) is separate from the ability to "avoid liability by showing that they had a reasonably grounded belief in the truth of the statement" (subsection (b))).

C. Courts Have Correctly Interpreted Section 11 This Way.

Courts confronting section 11 claims have frequently interpreted the statute in the manner described above. First of all, they have understood that audit work "addresses many [accounting] questions as to which the answers are uncertain and is a 'process [that] involves continuous judgments and estimates.'" *Shalala*, 514 U.S. at 100. Estimates of goodwill, for instance, depend on a "determination of the 'fair value' of the assets acquired and liabilities assumed, which are not matters of objective fact." *Fait*, 655 F.3d at 110. Likewise, "determining the adequacy of loan loss reserves" reflects an "opinion or judgment about what, if any, portion of amounts due on the loans ultimately might not be collectible." *Id.* at 113. Whether a concentration of credit risk is "significant," or whether a contract qualifies as a "guarantee" requiring disclosure of the "'maximum potential amount of future payments,'" are also matters of complex judgment. *In re Am. Int'l Grp., Inc., 2008 Sec. Litig.*, No. 08-4772, 2013 WL 1787567, at *4–5 (S.D.N.Y. Apr. 26, 2013). So is the recognition of other-than-temporary impairment in a security. *MHC Mut. Conversion Fund, L.P.* v. *United W. Bancorp, Inc.*, 913 F. Supp. 2d 1026, 1033–35 (D. Colo. 2012). The list is endless, as respondents themselves recognize. See Br. in Opp. to Pet. for Cert. at 20 ("[a]ccounting rules often require the exercise of judgment").

Not only have courts appreciated the subjective determinations that underlie an audit report, they have also correctly applied section 11 to claims based on those determinations, requiring plaintiffs to allege and prove subjective falsity. *Fait*, 655 F.3d at 110; *Am. Int'l Grp.*, 2013 WL 1787567, at *4–5; *MHC*, 913 F. Supp. 2d at 1033–37. That is exactly what section 11(a) demands: when a plaintiff cannot prove the falsity of the alleged untrue statement through objective evidence, but instead challenges a statement that expresses a subjective judgment, the plaintiff needs to show subjective falsity in order to proceed with an allegation that the statement is "untrue." The Court should not disturb this sound precedent.

III. THIS INTERPRETATION OF SECTION 11 IS CRITICALLY IMPORTANT FOR THE NATIONAL ECONOMY AND FOR THE AUDITING PROFESSION.

The Sixth Circuit's erroneous interpretation of section 11 portends dangerous risks for the national economy and for the auditing profession in particular. To begin with, the extension of private-plaintiff enforcement of the securities laws is costly to everyone. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452–53 (1st Cir. 2010) (Boudin, J., concurring). "[I]ncreased civil exposure must ultimately raise the price of accounting services," *Baena* v. *KPMG LLP*, 453 F.3d 1, 9 (1st Cir. 2006), and those costs "get[] passed along to the public," *Tambone*, 597 F.3d at 453 (Boudin, J., concurring).

This Court has been persistently mindful of these concerns. Securities cases are often brought as class actions, and they "presen[t] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v.

Manor Drug Stores, 421 U.S. 723, 739 (1975). The massive exposure companies face and the high cost and disruption of the litigation "allow plaintiffs with weak claims to extort settlements." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Given this nuisance value, many defendants "find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). As a result, "[p]rivate securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). In addition, abusive securities litigation "introduces an element of uncertainty into an area that demands certainty and predictability." *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988).

Auditors, moreover, "face[] catastrophic litigation risk different from that of other businesses." Dep't of Treasury, *Advisory Committee on the Auditing Profession: Final Report*, at VII:27 (Oct. 6, 2008) (citing Ctr. for Audit Quality, *Report of the Major Public Company Audit Firms to the Department of Treasury Advisory Committee on the Auditing Profession* 45 (Jan. 23, 2008)). Among other concerns, audit firms' potential exposure—which can include the entire drop in market capitalization for public company clients—"dwarfs audit fees," *id.*, and "far exceeds the firms' current financial ability to withstand liability from such exposure," Ctr. for Audit Quality, *Comment Letter to the Advisory Committee on the Auditing Profession* 5 (June 26, 2008). Such vulnerabilities ampli-

fy the need to police carefully the reach of a statute that directly implicates auditors.

These considerations only bolster the case against the Sixth Circuit's flawed reading of section 11. All of the familiar economic risks associated with broad liability standards reverberate loudly here, and yet the decision below adopted a construction that threatens to spur just the sort of meritless suits that this Court has cautioned against in the past. Indeed, it practically goes without saying that eliminating an element of proof—*i.e.*, the need to show subjective falsity in order to allege that a subjective assertion of opinion or judgment was untrue—makes it easier to bring suit, easier to get past a motion to dismiss, and easier to prevail.

Overly expansive liability under section 11 has potentially far-reaching ramifications for the audit profession in other ways, too. For example, audit opinions in registration statements are generated using the same PCAOB auditing standards that apply to other facets of audit work, including opinions that may appear in other SEC and regulatory filings. And those documents may be covered by other statutes or regulations that govern auditors' conduct. See, *e.g.*, 15 U.S.C. § 78j; 17 C.F.R. § 240.10b–5. The ruling here thus has the potential to affect how auditors approach every aspect of the job, and an interpretation like the Sixth Circuit's could "inhibit[] the use of professional judgment, imped[e] the evolution of more useful audit reports, and caus[e] overly cautious audits or 'defensive' auditing." Dep't of Treasury, *supra*, at VII:28. Construing the statute as written, by contrast, would permit auditors to make the subjective judgment calls that are the bread-and-butter of their work without undue fear of litigation and the risks of ruinous liability.

CONCLUSION

The judgment of the court of appeals should be reversed. Regardless of the ultimate disposition, however, the CAQ urges the Court not to disturb existing precedent holding that challenges to an auditor's exercise of professional judgment require an allegation of subjective falsity to be actionable under section 11.

Respectfully submitted,

CARTER G. PHILLIPS*
MICHAEL D. WARDEN
JONATHAN F. COHN
ERIC D. MCARTHUR
JOSHUA J. FOUGERE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

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Supreme Court of the United States

OMNICARE, INC., JOEL F. GEMUNDER, DAVID W. FROESEL, JR., CHERYL D. HODGES, THE ESTATE OF THE LATE EDWARD L. HUTTON, AND SANDRA E. LANEY,

Petitioners,

v.

THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND AND THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING PETITIONERS

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

GEORGE T. CONWAY III
Counsel of Record
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1260
gtconway@wlrk.com

Counsel for Amici Curiae

[Additional Counsel Listed on Inside Cover]

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MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Ave., N.W.
Suite 800
Washington, D.C. 20001
(202) 872-1260

Counsel for Business Roundtable

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IN THE

Supreme Court of the United States

No. 13-435

OMNICARE, INC., JOEL F. GEMUNDER, DAVID W. FROESEL, JR., CHERYL D. HODGES, THE ESTATE OF THE LATE EDWARD L. HUTTON, AND SANDRA E. LANEY,

Petitioners,

v.

THE LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND AND THE CEMENT MASONS LOCAL 526 COMBINED FUNDS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members, and indirectly

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, contributed money to fund its preparation or submission. All parties have filed letters granting blanket consent to the filing of *amicus curiae* briefs.

represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases involving the federal securities laws, such as *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317; *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); and *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market, and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders annually and give more than $9 billion per year in combined charitable contributions. BRT's member companies have a significant interest in public policy regarding securities fraud and class action litigation.

The Chamber and BRT have a substantial interest in this case because of the significant burdens imposed on their members by private securities class action litigation, which adversely affects access to capital markets and raises costs for American businesses of

all sizes. In particular, the Chamber and BRT are concerned that the Sixth Circuit's decision, by erroneously holding that truthful, genuinely held statements of belief and opinion may constitute misstatements of fact under Section 11 of the Securities Act of 1933, will compound these burdens in a manner inconsistent with this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), and Section 11's text.

SUMMARY OF ARGUMENT

A private startup technology company develops a new consumer-electronics product, NeckWidget. It is worn like a necklace, and immediately proves a hit. To raise the capital to expand NeckWidget production to meet the explosion in demand, NeckWidget Inc. decides to go public. It files a registration statement with the SEC under Section 5 of the Securities Act of 1933. The registration statement contains extensive and accurate disclosure about NeckWidget Inc.'s business and finances. And the registration statement truthfully expresses management's genuinely held opinion and belief: "We believe that a necklace-style e-widget such as the NeckWidget is superior in convenience, utility, and value to other kinds of widgets currently in the market or under development, and that the necklace style of our e-widget product gives us a competitive advantage." NeckWidget Inc.'s offering is priced at an unexpectedly strong $35 per share, and even at that lofty price, the issue is oversubscribed.

But NeckWidget Inc.'s opinions turn out to be wrong on all counts. The very week the NeckWidget offering is conducted, BigTech Corp. publicly announces what had until then only been rumored—that it is launching a competing product. Called WristWidget, it is worn

on the wrist. It turns out to be lighter, more powerful, easier to use—and cheaper—than NeckWidget. Contrary to the belief expressed in the registration statement, consumers find NeckWidget to be inferior, not superior, in convenience, utility, and value, and they strongly prefer WristWidget to NeckWidget. And so NeckWidget Inc. finds itself at a severe competitive *dis*advantage. WristWidget immediately begins taking market share away from NeckWidget. Within six weeks, sales of NeckWidget fall by 70 percent. And NeckWidget Inc.'s stock drops by over 95 percent, to $1.25 per share.

Under the Sixth Circuit's holding in this case, the hypothetical startup company would be subject to potentially devastating liability under Section 11 of the Securities Act of 1933 for expressing its genuinely held belief. The company's statement of belief was unquestionably true—the company *did* believe its product to be superior, and *did* believe it had a competitive advantage. But in the Sixth Circuit, no matter: a good-faith statement of sincerely held opinion and belief constitutes "'an untrue statement of a material fact'" simply because the opinion or belief turns out to be wrong. Pet. App. 11a (quoting 15 U.S.C. § 77k(a)).

Worse yet, the company would face "strict liability" for the truthful expression of its genuinely held opinion and belief. *Id.* at 12a. As this Court has said, Section 11 "places a relatively minimal burden on a plaintiff," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983): it does not require scienter, or even negligence, and certainly not reliance. The courts have essentially required purchasers in securities offerings to plead and prove one thing—a false statement of fact. As a result, under the decision below, a

company faced with a Section 11 class action for expressing a genuine but misguided opinion would have little chance on a motion to dismiss, and—given the inherently "*in terrorem*" nature of a securities class action, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)—a strong incentive to settle otherwise "weak claims" in order to avoid the significant expense of "extensive discovery and the potential for uncertainty and disruption in a lawsuit," *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

The Sixth Circuit's decision cannot be squared with precedent, statutory text, or logic. This Court has already spoken on when an opinion or belief can constitute a false statement of material fact under the federal securities laws. In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), the Court addressed a claim that a statement of opinion violated Rule 14a–9, a regulation promulgated under Section 14(a) of the Securities Exchange Act of 1934. Rule 14a–9 deals with proxy statements instead of registration statements, but like Section 11, its core element is a misstatement of fact—that the "proxy statement ... contain[] [a] statement which ... is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 501 U.S. at 1087 n.2 (quoting 17 C.F.R. § 240.14a–9).

The Court in *Virginia Bankshares* thus faced the same question presented here—when are "statements of reasons, opinions, or beliefs . . . statements 'with respect to material fact[s]' so as to fall within the strictures of the [applicable] Rule" or statute? *Id.* at 1091 (citation omitted). The Court gave a clear

answer. "A statement of belief" or opinion can be false "as a misstatement of the psychological fact of the speaker's belief in what he says"—and is false if made "with knowledge that the [speaker] did not hold the beliefs or opinions expressed." *Id.* at 1095, 1090. The Court thus concluded: "We hold that *knowingly* false statements of reasons," opinions, or beliefs "may be actionable." *Id.* at 1087 (emphasis added). Plaintiffs must accordingly plead and prove that a defendant "misstate[d] the speaker's reasons" or belief or opinion. *Id.* at 1095.

As Justice Scalia's concurring opinion put it, "the statement 'In the opinion of the Directors, this is a high value for the shares' would produce liability if in fact it was not a high value *and the directors knew that.*" *Id.* at 1108–09 (Scalia, J., concurring in part and in the judgment; emphasis added). In so holding, the Court followed what has long been the law in the securities realm and elsewhere—that "state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it," and that those who make such representations "may be held to good faith in their statements." *Seven Cases v. United States*, 239 U.S. 510, 517–18 (1916). "This approach makes logical sense," as "[r]equiring plaintiffs to allege a speaker's disbelief in, and the falsity of, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements." *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 112 (2d Cir. 2011).

There is no merit, moreover, to the court of appeals' and petitioners' assertions that *Virginia Bankshares*' statements about knowledge of an opinion's falsity were simply dicta, and merely reflected an assumption, for argument's sake, that Rule 14a–9 required

scienter. *See* Pet. App. 18a; Br. in Opp. 22, 25. There was no dicta: "We *hold* that knowingly false statements of reasons may be actionable," said this Court. 501 U.S. at 1087 (emphasis added). And there was no assumption about scienter: this Court expressly "*reserved* the question whether scienter was necessary for liability generally under § 14(a)." 501 U.S. at 1090 n.5 (emphasis added). As a result, the Court *held* that opinions and beliefs had to be knowingly, subjectively false in order to be actionable, and that holding stemmed from an element *other* than scienter. The Court's opinion makes repeatedly clear which element that was: a false "statement[] 'with respect to . . . material fact[]' . . . within the strictures of the Rule," *id.* at 1091 (quoting 17 C.F.R. § 240.14a–9)—an element likewise required under Section 11 here.

Finally, any departure from the *Virginia Bankshares* approach here would poorly serve both public companies and investors. Affirmance of the Sixth Circuit's holding would put securities issuers in grave peril of strict liability under Section 11 if their genuinely held opinions and beliefs turn out to be wrong. That, in turn, would deter issuers from engaging in public offerings in the United States. There is every reason to believe that the competitiveness of American capital markets has already been hobbled by the expansive liabilities imposed upon public securities issuers by our private securities litigation system. Holding issuers strictly liable for the sincerely held beliefs that they express in public offerings would only make matters worse. In addition, affirmance of the holding below would deter issuers from expressing their sincere beliefs, and thus would deprive investors of some of the most valuable insights they might obtain about the issuers' businesses. This Court should adhere to *Virginia Bankshares* here.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO *VIRGINIA BANKSHARES*.

A. *Virginia Bankshares* holds that opinions and beliefs constitute misstatements of fact only if they are subjectively false.

This case begins and ends with this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991). That case, like this one, involved the question whether, and under what circumstances, a statement of opinion may constitute a false or misleading statement of fact under a provision of the federal securities laws.

The provision at issue in *Virginia Bankshares* was SEC Rule 14a–9, which makes it unlawful to solicit proxies "'by means of any proxy statement . . . containing any statement which . . . is false or misleading with respect to any material *fact*, or which omits to state any material *fact* necessary in order to make the statements therein not false or misleading.'" 501 U.S. at 1087 n.2 (emphases added; quoting 17 C.F.R. § 240.14a–9). The proxy statement in question involved a merger in which the minority stockholders of Virginia Bankshares would receive $42 per share. In that proxy statement, Virginia Bankshares' directors opined that the merger would provide the minority holders with "a 'fair' price" and "a 'high' value," and represented that this was why the directors had approved the merger. *Id.* at 1088. A jury found that the defendants did not hold these beliefs at the time they were expressed. The district court entered judgment against the defendants, and the court of appeals affirmed. *Id.* at 1089.

In this Court, the defendants, as petitioners, "argue[d] that statements of opinion or belief . . . cannot be actionable as misstatements of material fact within the meaning of Rule 14a–9." *Id.* at 1090. Accordingly, the Court faced the question of "whether statements of reasons, opinions, or beliefs are statements 'with respect to . . . material fact[s]' so as to fall within the strictures of the Rule." *Id.* at 1091 (quoting 17 C.F.R. § 240.14a–9).

The Court held that reasons, opinions, and beliefs could indeed be statements of fact, and that they could be *mis*statements of fact if they were knowingly false. "[A] statement of belief" or opinion could constitute "a misstatement of the psychological fact of the speaker's belief in what he says," the Court reasoned, and a plaintiff could demonstrate the statement's falsity by proving the defendant's "*disbelief*" in it. *Id.* at 1095 (emphasis added). The plaintiff thus had to "prove a specific statement of reason [or belief, or opinion] knowingly false," *ibid.*—in other words, *subjective* falsity. "We hold that knowingly false statements of reasons may be actionable even though conclusory in form," stated this Court. *Id.* at 1087.

The Court went on to decide whether such subjective falsity sufficed to establish a *material* misstatement of fact, and held that it did not. The Court declined to "authorize § 14(a) litigation confined solely to . . . the 'impurities' of a director's 'unclean heart.'" *Id.* at 1096 (quoting *Stedman v. Storer*, 308 F. Supp. 881, 887 (S.D.N.Y. 1969)). "We think that proof of mere disbelief or belief undisclosed should not suffice for liability," the Court concluded, "and if nothing more had been required or proven in this case, we would reverse for that reason." *Ibid.* As a result, a plaintiff

must establish that the alleged misstatement not only "misstate[d] the speaker's reasons" or beliefs, but "also misle[d] about the stated subject matter." *Id.* at 1095. In other words, there must be "proof by . . . objective evidence . . . that the statement also expressly or impliedly asserted something false or misleading about its subject matter." *Id.* at 1095–96.

This additional requirement of objective falsity, the Court observed, would alleviate the danger of "strike suits," and neutralize the threat of "attrition by discovery" that this Court's decisions have repeatedly "sought to discourage." *Id.* at 1096 (citation omitted); *see, e.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734–35, 739–44 (1975). The requirement plainly arose from Rule 14a–9's element of materiality: as the case quoted by this Court explained, it would be "bemusing, and ultimately pointless, to charge that directors perpetrated a '*material* omission'" unless the "impurities" of their "unclean heart[s]" "result[ed] [in] damage to plaintiffs." *Stedman*, 308 F. Supp. at 887 (emphasis added), *quoted in part in Virginia Bankshares*, 501 U.S. at 1096. If the merger price offered to Virginia Bankshares' minority shareholders had indeed been "high" and "fair" even though the directors believed that it wasn't, then their misstatements of belief could not have been material to those shareholders.

In short, the Court in *Virginia Bankshares*—in a portion of the opinion joined by seven Justices—held that, for a statement of opinion to constitute a false statement of fact, the statement had to be subjectively false. In fact, the Court was unanimous on the point. Justice Scalia, who concurred in the opinion in part

and in the judgment, also crisply expressed the requirement of subjective falsity:

> As I understand the Court's opinion, the statement 'In the opinion of the Directors, this is a high value for the shares' would produce liability if in fact it was not a high value *and the directors knew that*. It would *not* produce liability if in fact it was not a high value *but the directors honestly believed otherwise*.

501 U.S. at 1108–09 (Scalia, J., concurring in part and in the judgment; emphases added). A ninth Justice wrote that he, too, "agree[d] in substance" with this aspect of the Court's opinion. *Id.* at 1110 (Stevens, J., concurring in part and dissenting in part).

Until the Sixth Circuit's decision here, the lower courts had no difficulty applying the Court's unanimous judgment. On remand in *Virginia Bankshares* itself, the Fourth Circuit recognized that this Court had held that "opinions" and "'statements of reasons'" had to be "'knowingly false [to] be actionable.'"[2] Over the next twenty-plus years, other courts of appeals likewise concluded that this Court had required plaintiffs to show that "the speaker did not actually hold the opinion expressed,"[3] that "the statement [of opinion] was . . . disbelieved by the defendant at the time it was expressed,"[4] that "the defendants . . . did

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[2] *Sandberg v. Va. Bankshares, Inc.*, 979 F.2d 332, 341 (4th Cir. 1992) (quoting 501 U.S. at 1087).

[3] *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 47 (1st Cir. 2005).

[4] *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011).

not hold those opinions or beliefs,"[5] that a statement of opinion was "disbelieved by its maker,"[6] "that the speaker did not in fact hold [the] belief" expressed,[7] that the statement "was not made in good faith,"[8] that it was "subjectively false,"[9] that it was "known by the speaker at the time it [was] expressed to be untrue,"[10] and that it was "issued without good faith."[11] Indeed, even the Sixth Circuit recognized that a plaintiff must show that "the speaker does not believe the opinion."[12]

B. *Virginia Bankshares'* subjective-falsity holding derived from the requirement that plaintiffs prove a misstatement of fact, and accordingly applies here.

The Sixth Circuit's conclusion that it would be a "stretch[]" to apply *Virginia Bankshares* in a Section 11 case, Pet. App. 18a, was based upon its reading of a single sentence in *Virginia Bankshares*—and a single footnote to that sentence. These tiny snippets

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[5] *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, 543 F.3d 150, 166 (3d Cir. 2008).

[6] *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004).

[7] *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 670 (5th Cir. 2004).

[8] *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1333 (7th Cir. 1995).

[9] *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009).

[10] *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 n.6 (10th Cir. 1997).

[11] *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1277 (D.C. Cir. 1994).

[12] *Mayer v. Mylod*, 988 F.2d 635, 639 (6th Cir. 1993).

of this Court's opinion cannot bear the weight the court of appeals placed on them.

The sentence cited the *Virginia Bankshares* jury's "'finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed.'" *Ibid.* (quoting 501 U.S. at 1090). As for the "footnote to this sentence," it "reserve[d] 'the question whether scienter [is] necessary for liability . . . under § 14(a).'" *Ibid.* (quoting 501 U.S. at 190 n.5). According to the court below, "[t]he connection of these two statements indicates that the *Virginia Bankshares* Court . . . tied the knowledge of falsity requirement to scienter . . ." *Ibid.* "Since the Supreme Court assumed knowledge of falsity for the purposes of the discussion in *Virginia Bankshares*," the court of appeals reasoned, "§ 14(a) was effectively treated as a statute that required scienter," and, "therefore, has very limited application to § 11" here. *Ibid.* Thus, in the view of the court of appeals, the extended discussion of "the knowledge of falsity requirement" in *Virginia Bankshares* was merely this Court's roundabout way of assuming *arguendo* that scienter was required under Section 14(a).

This reinterpretation of *Virginia Bankshares* is self-contradictory and wrong. This Court did indeed impose, as the court of appeals recognized, a "knowledge of falsity requirement," Pet. App. 18a—but that requirement had nothing to do with scienter. It could not have, because the Court did not hold that Section 14(a) requires scienter, and did not even assume it. The Court simply "*reserved* the question whether scienter [is] necessary for liability *generally* under § 14(a)," 501 U.S. at 1090 n.5 (emphases added)—and, as the court of appeals recognized,

"explicitly declined to address the issue further," Pet. App. 18.

The knowledge of falsity requirement, discussed at length by the Court, 501 U.S. at 1092–96, necessarily flowed from some element other than scienter. And the Court's opinion repeatedly makes clear what that other element was: that of a "misstatement[] of material *fact* within the meaning of Rule 14a–9." 501 U.S. at 1090 (emphasis added). Again, "the question [was] whether statements of reasons, opinions, or beliefs are statements 'with respect to . . . material fact[s]' so as to fall within the strictures of the Rule." *Id.* at 1091 (quoting 17 C.F.R. § 240.14a–9). The answer was yes—*if* the statements were "knowingly false." *Id.* at 1087, 1095.

This holding on the element of a false or misleading material *fact* therefore fully applies under Section 11 as well. The rule that "[g]enerally, 'identical words used in different parts of the same statute are . . . presumed to have the same meaning,'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)), also commands force when there is "similar[] . . . language" in "two statutes [that] share a common *raison d'etre*," *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam); *accord Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion). Here, just as a violation of Rule 14a–9 requires proof that a proxy solicitation contained a "statement which . . . is false or misleading with respect to any material fact," 17 C.F.R. § 240.14a–9, Section 11 proscribes registration statements that "contain[] an untrue statement of a material fact or omit[] to state a material fact . . . necessary to make the statements therein not misleading," 15 U.S.C. § 77k(a).

Accordingly, given that Section 11 of the 1933 Act and Section 14(a) of the 1934 Act were "enacted by the same Congress . . . and form[ed] part of the same comprehensive regulation of securities trading," *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 268 (2010), the Court should define a misstatement of fact identically under both provisions—just as it has held, for example, that the concepts of materiality,[13] manipulation,[14] territoriality,[15] and "in connection with"[16] should be construed identically across the federal securities laws. If a statement of opinion can only constitute a misstatement of fact under Section 14(a) because the speaker did not in fact "hold the belief stated," *Va. Bankshares*, 501 U.S. at 1092, the same rule governs under Section 11 here.

Although "§ 11 is a strict liability statute" and thus does not "require a plaintiff to prove scienter," Pet. App. 15a, that does not change the requirements of the "fact" element. The same could be said about Section 14(a) and Rule 14a–9: The lower courts have held that Section 14(a) does *not* require

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[13] *See, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011) (Section 10(b) of the 1934 Act and Rule 10b–5); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (Section 14(a) of the 1934 Act and Rule 14a–9).

[14] *See Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 6 (1985) (Section 14(e) of the 1934 Act); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (Section 10(b)).

[15] *See Morrison*, 561 U.S. at 268 (noting "[t]he same focus on domestic transactions is evident" in both the 1933 and 1934 Acts).

[16] *See Dabit*, 547 U.S. at 85–86 (Section 10(b) of the 1934 Act and Section 101(b) of the Securities Litigation Uniform Standards Act of 1998).

scienter,[17] yet have nonetheless held that *Virginia Bankshares* imposes a subjective disbelief/knowledge-of-falsity requirement to statements of opinion challenged under Rule 14a–9.[18] Thus, even if Section 11 and Rule 14a–9 do not require scienter, they both still require misstatements of fact—and thus both require subjective disbelief for a statement of opinion to constitute a misstatement of fact.

Finally, it makes no difference here that "liability under § 14(a)" is "implied," whereas liability under Section 11 is based upon "clear text." Br. in Opp. 26. For *Virginia Bankshares* addressed the scope of the conduct prohibited by Section 14(a) and Rule 14a–9, and not "the additional 'elements of the . . . private liability scheme'" that this Court "'ha[s] had to infer'"

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[17] "[U]nlike Section 10(b), Section 14(a) lacks any reference to a manipulative device or contrivance ... to indicate a requirement of scienter," *Knollenberg v. Harmonic, Inc.*, 152 F. App'x 674, 682 (9th Cir. 2005) (citation and internal quotation marks omitted), language that led this Court to find scienter to be required under Section 10(b), *Ernst & Ernst*, 425 U.S. at n.28, 197, 199. "Based in large part on ... textual analysis, the weight of authority [in the lower courts] rejects a scienter standard for claims under Section 14," and, "[i]ndeed, with respect to defendants who directly solicited proxies, it appears that no reported opinion requires [a] plaintiff to plead or prove scienter." *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1263 (N.D. Cal. 2000); *see, e.g.*, *Knollenberg*, 152 F. App'x at 682; *SEC v. Das*, 723 F.3d 943, 953–54 (8th Cir. 2013); *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009); *In re Exxon Mobil Sec. Litig.*, 500 F.3d 189, 196 (3d Cir. 2007); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1298–1301 (2d Cir. 1973) (Friendly, J.).

[18] *E.g.*, *Knollenberg*, 152 F. App'x at 682; *Hayes v. Crown Cent. Petroleum Corp.*, 78 F. App'x 857, 864 (4th Cir. 2003); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 372 (3d Cir. 1993); *Mendell v. Greenberg*, 938 F.2d 1528, 1529 (2d Cir. 1991) (per curiam).

when it, and not Congress, has created the right to sue. *Morrison*, 561 U.S. at 261 n.5 (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (internal quotation marks and citation omitted)). And this Court has repeatedly made clear that, "'when it comes to the scope of . . . the conduct prohibited'" by a statute or rule, "'the text . . . controls [this Court's] decision.'" *Id.* (quoting *Cent. Bank*, 511 U.S. at 173). The text construed in *Virginia Bankshares*—the phrase "statement which . . . is false . . . with respect to any material fact," 17 C.F.R. § 240.14a–9—is substantively identical to the text at issue here—"untrue statement of a material fact," 15 U.S.C. § 77k(a). This Court's interpretation of the text in *Virginia Bankshares* accordingly controls here.

II. THIS COURT SHOULD ADHERE TO *VIRGINIA BANKSHARES*.

A. *Virginia Bankshares* correctly interpreted the meaning of "false statement of fact."

This Court's holding in *Virginia Bankshares* rested upon a simple, indisputable proposition: that an opinion can be factually false if it is a "misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. "This approach makes logical sense," as "[r]equiring plaintiffs to allege a speaker's disbelief in, and the falsity of, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements." *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 112 (2d Cir. 2011).

The Court's commonsensical understanding of what is a "fact" also has a long lineage in the law. "Of course, by 'fact' the courts probably meant, originally, facts of the external world existing outside of the

person's mind, and having material substance . . ."[19] "But at least by the nineteenth century it had become a familiar notion that 'the state of a man's mind is as much a fact as the state of his digestion.'"[20] By the time the securities laws were enacted, it was already well accepted that "state of mind is itself a fact, and may be a material fact, and [that] false and fraudulent representations may be made about it . . ." *Seven Cases v. United States*, 239 U.S. 510, 517 (1916). As Judge Learned Hand observed, the cases had "often pointed out" that an "opinion . . . involves at least . . . the belief of the utterer in the truth of what he says," and in that "sense . . . is a statement of fact." *Taylor v. Burr Printing Co.*, 26 F.2d 331, 334 (2d Cir. 1928). And as he put it in a passage quoted in *Virginia Bankshares*, 501 U.S. at 1094: "An opinion is a fact, and it may be a very relevant fact; the expression of an opinion is the assertion of a belief . . ." *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918). It was thus "well settled that fraud may consist in asserting a belief or an opinion, when such belief or opinion is not entertained and the assertion is made in bad faith, with a design to mislead and deceive." *Keeler v. Fred T. Ley & Co.*, 49 F.2d 872, 874 (1st Cir. 1931).

As the *Restatement (First) of Torts* put it: "Strictly speaking, 'fact' includes not only the existence of a tangible thing or the happening of a particular event . . ., but also the state of mind, such as the entertaining

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[19] W. Page Keeton, *Fraud: Misrepresentations of Opinion*, 21 MINN. L. REV. 633, 644 (1937).

[20] 2 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES & GRAY ON TORTS § 7.8, at 505 n.12 (3d ed. 2006) (quoting *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459, 483 (A.C.) (Bowen, L.J.)).

of an intention or the holding of an opinion, of any person . . ." RESTATEMENT (FIRST) OF TORTS § 525 cmt. c, at 60 (1938); *accord* RESTATEMENT (SECOND) OF TORTS § 525 cmt. d, at 56 (1977). And so "a statement that a particular person, whether the maker of the statement or a third person, is of a particular opinion . . . is a misrepresentation if the person in question does not hold the opinion . . ." RESTATEMENT (FIRST) OF TORTS § 525 cmt. b, at 60; *accord* RESTATEMENT (SECOND) OF TORTS § 525 cmt. c, at 56. That unimpeachable proposition is exactly what *Virginia Bankshares* holds.

B. Failure to apply *Virginia Bankshares* would harm American capital markets and investors.

From a policy standpoint, it is critically important to the securities markets that Section 11's reference to "untrue" or "misleading" "statement of material fact," when the fact is an opinion or belief, be construed to refer only to opinions and beliefs not genuinely held by the statement's maker. To hold otherwise would mean virtually absolute liability for defendants who express opinions and beliefs that turn out, in hindsight, to be wrong. That result would deter issuers from engaging in public offerings in the United States, and would thus significantly diminish the competitiveness of American capital markets, which are already disadvantaged by the expansive liabilities imposed upon issuers by our private securities litigation system. In addition, imposing liability for genuinely held beliefs under Section 11 would significantly lessen the quality of disclosure to investors: it would deter issuers from expressing genuinely held opinions and beliefs about their businesses, including opinions and beliefs that turn out to be correct.

1. The courts have held that Section 11 requires little more than the pleading and proof of an untrue or misleading statement of fact. "Although limited in scope, §11 places a relatively minimal burden on a plaintiff." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). There is no element of scienter, no element of causation, and no element of reliance: Section 11 does not "'require[] that plaintiffs allege the scienter or reliance elements of a fraud cause of action,'" *In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70, 73 n.1 (2d Cir. 2006) (citation omitted); to the contrary, "in a Section 11 case, 'the general rule [is] that an issuer's liability . . . is absolute.'" *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 716 (2d Cir. 2011) (citation omitted).

These minimal pleading requirements, combined with virtually strict liability against the issuer, make Section 11 an attractive vehicle for shareholder plaintiffs and their lawyers. Indeed, "the weapon of choice for class action plaintiffs' lawyers is to allege, whenever possible, violations of Sections 11 and 12(a)(2) of the Securities Act of 1933,"[21] the latter being a provision that similarly focuses on public offerings, and likewise requires the pleading of little more than an "untrue" or "misleading" "statement of a material fact," 15 U.S.C. § 77*l*(a)(2); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 567–68, 584 (1995). The absence of any requirement of reliance makes it easy for claims under Sections 11 and 12(a)(2) to be litigated as class actions.[22]

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[21] Joel G. Chefitz & Andrew B. Kratenstein, *A Winning Strategy for Beating IPO Class Actions*, LAW360 (Apr. 4, 2011), http://bit.ly/TNx2os.

[22] *Cf., e.g., Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) ("requir[ing] . . . plaintiffs [to] establish

As a result, what this Court has repeatedly said of claims under the judicially implied right under Section 10(b) and Rule 10b–5 is at least as true, if not more so, under the express right of Section 11: Such "litigation . . . presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general,'" *Dabit*, 547 U.S. at 80 (quoting *Blue Chip Stamps*, 421 U.S. at 739), and through "extensive discovery and the potential for uncertainty and disruption in a lawsuit," may "allow plaintiffs with weak claims to extort settlements from innocent companies," *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008); *accord Blue Chip Stamps*, 421 U.S. at 741 (broad liability under Rule 10b–5 may "permit[] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value").

2. Moreover, imposing strict liability under Section 11 for truthful opinions and beliefs that turn out to be wrong would compound a major problem faced by America's capital markets: the negative impact that expansive securities-law liability has had on public companies' willingness to offer securities in the United States. It is beyond cavil, of course, that "U.S.-listed companies face the potential of extraordinary litigation costs that companies listed abroad do not,"[23]

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reliance would ordinarily preclude certification of a class action seeking money damages").

[23] FINANCIAL SERVICES FORUM, 2007 GLOBAL CAPITAL MARKETS SURVEY 7 (2007), http://bit.ly/1wicO52; *see also* COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT 78 (2006) (hereinafter "INTERIM REPORT") (noting that director and officer

as "[s]ecurities class actions do not exist in the United Kingdom or in the markets of other major competitor[]" nations.[24] As a result, as this Court has itself observed, expansive liability under the federal securities laws "may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *Stoneridge*, 552 U.S. at 164.

And there is good reason to believe that, in fact, this has been happening. According to a study released in May 2014 by the Committee on Capital Markets Regulation, a prominent group of capital-markets experts, "a number of key measures of market competitiveness" for American capital markets have "showed dramatic declines over previous years."[25] In particular, the U.S. share of global IPOs by foreign companies in 2013 and the first quarter of 2014 was 7.0% and 5.4%, respectively—substantially lower than the 26.8% share that the United States had enjoyed between 1996 and 2007.[26] In the first quarter of 2014,

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"insurance costs for a Fortune 500 company are over six times higher in the United States than in Europe"), http://bit.ly/2nLtP.

[24] INTERIM REPORT, *supra*, at 11; *see also, e.g.*, Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT'L L. 157, 157–58 (2001) ("few other nations have adopted the class action device even to a limited extent"); *cf. Morrison*, 561 U.S. at 269 (citing foreign-government amicus briefs, and noting that "regulation of other countries differs from ours as to . . . what individual actions may be joined in a single suit").

[25] Committee on Capital Markets Regulation, Continuing Competitive Weakness in U.S. Capital Markets (May 1, 2014) (hereinafter "Competitive Weakness"), http://bit.ly/1jZBB8G.

[26] *Id.*; Committee on Capital Markets Regulation, Continuing Competitive Weakness in U.S. Capital Markets Data Summary Chart (May 1, 2014), http://bit.ly/1jZ36AA.

moreover, over 91% of initial offerings conducted by foreign companies in the United States were private offerings, rather than public offerings—a figure that "stands significantly higher than the historical average," and reflects substantial "aversion to U.S. public equity markets."[27] And the level of cross-listing by foreign companies in the United States in the most recent quarter is likewise low by historical standards, a reflection that the United States legal "climate is not attractive" to foreign companies.[28]

A major reason why the United States legal climate is so unattractive is securities class action litigation. "One of the most dominant criticisms of U.S. capital markets is that the heavily litigious environment imposes significant costs disproportionate to its benefits."[29] Indeed, "[f]oreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market."[30] As explained several years ago in a joint report by New York City Mayor Michael Bloomberg and Senator Charles Schumer, surveys have indicated that "the high legal cost of doing business in the US financial services industry is of real concern to corporate executives," with the executives

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[27] Competitive Weakness, *supra*.

[28] *Id.*

[29] COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS 29 (2007), http://bit.ly/1hReApN.

[30] INTERIM REPORT, *supra*, at 11, 71.

citing "propensity toward legal action [as] the predominant problem."[31]

In particular, and "[w]orryingly" for American capital markets, the executives overwhelmingly believed that "London was preferable" to New York because the United Kingdom was "less litigious" than the United States.[32] Similarly, a survey conducted by the Financial Services Forum reflected that "[o]ne out of three companies . . . that considered going public in the United States rated litigation as an 'extremely important' factor in their decision, and nine out of 10 companies who de-listed from a U.S. exchange . . . said the litigation environment played some role in that decision."[33] To impose liability on issuers for their good-faith statements of belief or opinion under Section 11 would discourage them from ever listing in the United States in the first place.

3. Finally, the potential for issuers to be held liable under Section 11 for truthful statements of belief or opinion would chill corporate disclosures of information that investors find useful, and would thus frustrate the disclosure objectives of the federal securities laws. In particular, "litigation severely affects the willingness of corporate managers to disclose information to the marketplace";[34] firms that disclose their opinions and beliefs "inevitably take[] the risk of excessive optimism and excessive pessimism," and "[a]

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[31] MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US'S GLOBAL FINANCIAL SERVICES LEADERSHIP 75 (2007), http://bit.ly/dA2kU.

[32] *Id.* at 75, 85.

[33] FINANCIAL SERVICES FORUM, 2007 GLOBAL CAPITAL MARKETS SURVEY 8 (2007), http://bit.ly/1wicO52.

[34] H.R. CONF. REP. 104–369, at 42 (1995).

rule that penalizes excesses in either direction would lead to quiet, not (necessarily) to an increase in the world's portion of truth."[35] Alternatively, to the extent disclosure is compelled by rule, "management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976).

These effects would be bad for investors. "[T]he unique insights of companies and their officers and directors are essential to market efficiency."[36] Indeed, as a former SEC chairman once testified before Congress, "'[u]nderstanding a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm.'"[37] As a result, to the extent that liability rules have a "'chilling effect ... on the robustness and candor of disclosure,'" "'[s]hareholders are . . . damaged.'"[38]

In short, to hold securities issuers strictly liable for expressing their sincerely held beliefs and opinions not only would deter some issuers from participating in the American capital markets at all, but would also deter issuers who do participate in those markets

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[35] Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 640 (1985).

[36] Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 LA. L. REV. 381, 406 (2013).

[37] H.R. CONF. REP. 104-369, at 43 (1995) (quoting testimony of Richard C. Breeden, Hearing on Securities Litigation Reform Proposals: Subcommittee on Securities, Senate Committee on Banking, Housing, and Urban Affairs, Apr. 6, 1995).

[38] *Id.* at 42–43 (quoting Breeden testimony).

from providing investors with valuable insights about their businesses. This Court should apply *Virginia Bankshares*' sensible rule to Section 11, and should reject the contrary holding below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Ave., N.W.
Suite 800
Washington, D.C. 20001
(202) 872-1260

Counsel for Business Roundtable

GEORGE T. CONWAY III
Counsel of Record
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1260
gtconway@wlrk.com

Counsel for Amici Curiae

June 12, 2014

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., *et al.*,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF COMMON LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES J. SABELLA
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
(646) 722-8520

ERNEST A. YOUNG
Counsel of Record
203 Strolling Way
Durham, NC 27707
(919) 360-7718
young@law.duke.edu

DARREN CHECK
KESSLER, TOPAZ, MELTZER, & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Counsel for Amici

September 2, 2014

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QUESTION PRESENTED

Whether an objectively incorrect statement of opinion is actionable under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, only if it was subjectively disbelieved by the defendant.

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INTEREST OF *AMICI*

Amici are legal scholars who write and teach about the common law as it bears on issues of current regulation, including issues of misrepresentation and false opinions.[1] They include scholars in the fields of contracts, torts, criminal law, remedies, consumer law, and securities regulation. Samuel W. Buell is Professor of Law at Duke Law School, where his research and teaching focus on criminal law and regulation of corporations and financial markets. James D. Cox is the Brainerd Currie Professor of Law at Duke Law School, where he teaches and writes about corporate and securities law. Deborah DeMott is the David F. Cavers Professor of Law at Duke Law School, where her teaching and scholarship focus on tort and corporate law and the law of agency. She also served as reporter for the Restatement (Third) of Agency, published in 2006. Christopher L. Griffin, Jr., is Assistant Professor of Law at William & Mary Law School, where he teaches and writes about torts and the law of remedies. Ann M. Lipton is a Visiting Assistant Professor at Duke Law School, where she teaches and writes about securities litigation. Lauren E. Willis is Professor of Law at Loyola Law School Los Angeles, where she teaches and writes about consumer law and contracts. She is also an Adviser to the Restatement (Third) of Consumer Contracts.

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1. This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The core of Petitioners' position is that "[t]he only 'fact' conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. It naturally follows that such a statement can be 'untrue' as to a 'material fact' only if the speaker did not actually hold the stated belief." Petitioners' Brief at 11. That is not, however, what this Court said in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1990); it is not even the position taken by the Second and Ninth Circuits. Even those courts that have read *Virginia Bankshares* as requiring *both* subjective and objective falsity have nonetheless presupposed that an opinion statement may be objectively false.

That is also the clear position of the common law, both as it existed at the time the Securities Act was drafted and today. Across a variety of fields—from the torts of misrepresentation and defamation to rules of contract and restitution—the common law acknowledges that opinion statements may be objectively false if they imply underlying facts, and that they may be actionable if made by a person who stands in a relation of trust to the recipient, purports to be an expert, or has special access to facts. The circumstances in which opinion statements triggers liability at common law tracks the circumstances involved in securities litigation under § 11 of the 1933 Act, and the Act is best read as incorporating those exceptions.

Petitioners' position is particularly untenable with respect to statements of law. Petitioners maintain that "[a]n assertion of legal compliance cannot be definitively true or false at the time it is made except in the rare case in which a court has already definitively ruled

on the legality of the issuer's actions." Petitioners' Brief at 34-35. This extraordinary position seems to question the very notion of a rule of law. The common law, however, is far more nuanced. It recognizes that many statements on legal matters imply the existence of underlying facts, such that the legal statements can be actionable as misrepresentations if those facts do not exist. It also acknowledges that lawyers frequently have more information and expertise than the recipients of statements about the law, and that they frequently stand in a relation of trust to those recipients. Moreover, the law has frequently had to confront legal uncertainty on some points, and in many areas—including qualified immunity, Fed. R. Civ. P. 11, and *habeas corpus*—it has developed effective tools to separate opinions about legitimately uncertain legal questions from legal judgments that are simply and objectively wrong. As with opinion statements generally, the circumstances of a securities registration statement under the 1933 Act fit particularly well with the situations in which the common law makes legal judgments potentially actionable.

ARGUMENT

I. The common law provides both the background against which Congress legislated in the Securities Act of 1933 and contemporary insight into the general question of opinion falsity.

This brief focuses on common law principles concerning misrepresentations and opinions, including the special case of opinions about the law. The common law is relevant in two distinct senses. When Congress enacted the Securities Act in 1933, it legislated against a

common law background that informed the content of the Act and continues to provide insight into what Congress had in mind. The common law and federal securities law also continue to share certain basic questions, and the resolution of those questions in one area may shed light as to how to proceed in the other.

Section 11 of the Securities Act imposes liability based on a registration statement's inclusion of an "untrue statement of a material fact or omi[ssion] to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k. Congress enacted this provision against the background of the common law of misrepresentation and deceit. *See, e.g.*, 7 Louis Loss, Joel Seligman, & Troy Paredes, *Securities Regulation* 426, 434 (4th ed. 2012). To be sure, "the courts have repeatedly held that the fraud provisions in the SEC Acts . . . are not limited to circumstances that would give rise to a common law action for deceit." *Id.* at 435. As then-Judge Alito stated, "[i]t is well known that the federal securities laws provide broader fraud protection than the common law, having been enacted in response to the common law's perceived failure at stamping out fraud in the securities markets." *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 218 (3d Cir. 2005). Nonetheless, "conceptions familiar in the common law are retained" in § 11, including the need to identify "a matter of 'fact' as distinguished . . . from one of 'opinion.'" Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L. J. 227, 249 (1933). How the common law treated that question—and in particular, how it dealt with the sort of circumstances that arise in the context of a securities offering—is instructive as to what Congress intended in the 1933 Act. And because Congress intended to supplement common law liability, "it seems reasonable to assume at the very least that the

most liberal common law views on these questions should govern under the statutes." Loss, *et al.*, *supra*, at 434.

The common law is also relevant in a second sense. As a leading treatise says, "[i]t is obvious from the language [of the SEC statutes] that some of the basic problems are the same—what is false, what is a fact, what is material." Loss, *et al.*, *supra*, at 434. This case concerns what is false. As Petitioners assert, that is a question under *all* the federal securities laws—under § 11 of the 1933 Act as well as under the antifraud provisions of the 1934 Act and SEC Rule 10b-5. But the same question has required an answer under the common law of torts, contracts, and restitution. The interaction of the First Amendment with the common law of defamation, for instance, has forced courts to distinguish particularly carefully between what is a falsifiable fact and what is a non-falsifiable opinion.

For this latter reason, it is useful to consider not only the common law as it appeared to Congress in 1933, but also contemporary principles and decisions that may shed light on the parallel problems posed by the securities laws. We have accordingly cited decisions and commentary that postdate the 1933 Act alongside materials that would have been available to the Act's drafters. In any event, the law displays considerable consistency over time on the principles relevant to this case.

II. Under the common law and this Court's decision in *Virginia Bankshares*, opinions may be both subjectively and objectively false.

The common law rule, reflected across the spectrum of tort, contract, and related fields, is that "a claim for misrepresentation lies only for misrepresentation of a

fact." 2 Dan B. Dobbs, *The Law of Torts* § 477, at 1364 (2001). But although this rule "is often broadly stated . . . in fact courts recognize a number of undermining exceptions"; hence, "liability may be imposed for false and material misrepresentations of opinion when the defendant is a fiduciary, when he is a disinterested person or an expert upon whom the plaintiff can justifiably rely, when he has special knowledge, and when the opinion implies material facts." *Id.* at 1365. These exceptions presuppose that opinion statements may be objectively—as well as subjectively—false. And they track quite well the circumstances that actually exist in securities transactions. In fact, it makes sense to think of § 11 as codifying not the general rule but rather the exceptions that the common law always recognized for statements of opinion from fiduciaries who possess special expertise and knowledge of the facts, and whose conclusions frequently imply the existence of such facts.

A. *Virginia Bankshares* and the Courts of Appeals requiring subjective falsity presuppose that opinions may be objectively false.

This Court rejected the core of Petitioners' position in *Virginia Bankshares* when it observed that "statements of reasons or belief . . . are factual in two senses: as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed." 501 U.S. at 1092. Much as Petitioners argue here, the defendants in *Virginia Bankshares* argued that opinion statements—such as the claim that the merger price was "high" or its terms were "fair"—are too "indefinite and unverifiable" to be capable of falsification. *Id.* at 1093. But the Court rejected that argument:

> The objection ignores the fact that such conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading. Provable facts either furnish good reasons to make a conclusory commercial judgment, or they count against it, and expressions of such judgments can be uttered with knowledge of truth or falsity just like more definite statements, and defended or attacked through the orthodox evidentiary process that either substantiates their underlying justifications or tends to disprove their existence.

Id. Immediately following this passage, the Court cited *Day v. Avery*, 548 F.2d 1018 (D.C. Cir. 1976), a common law misrepresentation decision turning not on subjective falsity, but rather on doctrines that recipients of opinion statements may, in certain circumstances, rely on those statements as representations of underlying facts. *See id.* at 1026-27. And the *Virginia Bankshares* Court concluded that "[i]n this case, whether $42 was 'high,' and the proposal 'fair' to the minority shareholders, depended on whether provable facts about the Bank's assets, and about actual and potential levels of operation, substantiated a value that was above, below, or more or less at the $42 figure, when assessed in accordance with recognized methods of valuation." 501 U.S. at 1094.

It is thus simply wrong to attribute to *Virginia Bankshares* the view that "[b]ecause a statement of opinion 'by definition' is a statement about what the speaker believes, the jury could have found the statements

at issue to be false as to a 'material fact' only insofar as the statements falsely conveyed the directors' actual opinion." Petitioners' Brief at 17 (citing *Virginia Bankshares*, 501 U.S. at 1090). This Court clearly did not view opinion statements as only falsifiable in a single sense (subjective falsity). Rather, the Court said that such statements "are factual in *two* senses." 501 U.S. at 1092 (emphasis added). Justice Scalia confirmed this understanding when he read the Court's opinion to require both subjective *and* objective falsity. *Id.* at 1109 (Scalia, J., concurring in part and in the judgment). *Amici* do not agree with Justice Scalia's reading on that point, but for present purposes the critical point is that any notion that both subjective and objective falsity are required presupposes that, even for opinion statements, both subjective and objective falsity are *possible*.

By denying that objective falsity is even possible, Petitioners have cast themselves adrift from the courts of appeals whose reasoning they purport to defend. The Second Circuit explained in *Fait v. Regions Financial Corp.*, 655 F.3d 105, 112 (2d Cir. 2011), that "[r]equiring plaintiffs to allege a speaker's disbelief in, *and the falsity of*, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements" (emphasis added); *see also Rubke v. Capitol Bancorp, Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (holding that opinion statements support a § 11 claim only if "the statements were *both objectively and subjectively false* or misleading") (emphasis added). Petitioners' position seems to be that opinion statements can *only* be subjectively false, but no court has adopted that view.

B. The common law of tort likewise treats opinions as objectively false and therefore actionable in a variety of situations.

Virginia Bankshares's holding that opinion statements may be objectively false rested firmly on the common law. The common law deals with misrepresentations and statements of opinion in a number of different areas, including not only the tort of misrepresentation or deceit but also the tort of defamation and the law of contract and restitution. The Securities Act was enacted to go beyond the common law standards of liability for misrepresentations. Nonetheless, as *Virginia Bankshares*'s reliance on *Day v. Avery* attests, the common law sets an important baseline. As to false statements of opinion, the 1933 Act embodies—at a minimum—the particular application of well-established common law doctrine to the context of a registration statement issued to purchasers in the securities markets.

The common law plainly recognized that statements of opinion may be false in a number of ways. *Day v. Avery* recognized that an opinion statement "ordinarily would not be a sufficient predicate for [a tort action for misrepresentation] as between parties truly dealing at arms' length." 548 F.2d at 1025-26.[2] The court noted a number of exceptions, however, based on "circumstances that would lead the reasonable person to believe that implicit in the prediction or opinion is an assertion of fact

2. *See also* Sydney Edward Williams, *Kerr on Fraud and Mistake* 53 (1929) ("A representation, to be material, should be in respect of an ascertainable fact, as distinguished from a mere matter of opinion.").

upon which the recipient . . . might prudently rely." *Id.* at 1026. These circumstances include "[w]here the person making the representation occupies a fiduciary or other position of trust"; "where the speaker may reasonably be understood as having based an opinion or prediction on facts that are unavailable to the listener either because he does not have access to them or because he is obviously incapable of interpreting them"; and where "one who asserts that a future event will come to pass impliedly warrants that he knows of no fact that will prevent its occurrence." *Id.* at 1026-27.

Section 539 of the Restatement (Second) of Torts recognizes a similar rule:

> (1) A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement
>
> (a) that the facts known to the maker are not incompatible with his opinion; or
>
> (b) that he knows facts sufficient to justify him in forming it.[3]

3. *See also* Restatement of Torts § 539 (1938) (articulating a similar rule); Williams, *supra*, at 53 ("It is often fallaciously assumed that a statement of opinion cannot involve a statement of fact. But if the facts are not equally known to both sides, a statement of opinion by the one who knows the facts best often involves a statement of a material fact, for he implicitly states that he knows facts which justify his opinion.").

This provision confirms the second sense in which *Virginia Bankshares* recognized an opinion may represent falsifiable facts—that is, as "statements about the subject matter of the reason or belief expressed."[4] The commentary to this section emphasizes that opinions imply underlying facts "particularly when the maker is understood to have special knowledge of facts unknown to the recipient." Restatement (Second) of Torts § 539 cmt. b.[5]

The distinction between fact and opinion is most developed in the law of defamation. At common law, "[t]he expression of opinion was . . . actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory." Restatement (Second) of Torts § 566 cmt. a. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), this Court held that "[t]here is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact." That holding did *not*, however, result in all opinions being immune from defamation suits; rather, tort law distinguishes between "pure" and "mixed" expressions

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4. *See also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 115 (Del. 2006) ("When the recipient does not know the facts, he may justifiability rely upon [the] implied assertions and recover on the basis of a misrepresentation of implied fact.").

5. The Restatement (Second) gives the example that "when an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that his examination has been sufficient to permit him to form an honest opinion and that what he has found justifies his conclusion. . . . [H]e is subject to liability if he has not made the examination, or if he has not found facts that justify the opinion, on the basis of his misrepresentation of the implied facts." *Id.*

of opinion. Pure statements of opinion occur "when the maker of the comment states the fact on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications or character," or when "both parties to the communication know the facts or assume their existence"; in each situation, "[t]he statement of facts and the expression of opinion based on them are separate matters." Restatement (Second) of Torts § 566 cmt. b. "Mixed" statements, on the other hand, occur when these conditions are not met; hence, "the expression of the opinion gives rise to an inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant. To say of a person that he is a thief without explaining why, may, depending on the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery." *Id.*

Mixed defamatory statements of opinion are actionable, notwithstanding the First Amendment, because they are treated as including a defamatory statement of fact that, if false, is unprotected. *See* Restatement (Second) of Torts § 566 ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.").[6] Under this rule, "[i]t is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct." *Id.*

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6. *See also id.* cmt. c; *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977).

The critical point is that all of these defamation rules focus on the opinion's *objective* falsity; they thus stand as counter-examples to Petitioners' extraordinary claim that opinions may be false only in a subjective sense. At common law, subjective falsity was irrelevant to defamation; except in peripheral cases, defamation was a strict liability offense. *See id.* § 580B cmt. b. *Gertz* held that the First Amendment requires not only that the defamatory statement be untrue but also that the defendant have some degree of fault, but aside from public figures negligence remains sufficient. *See* 418 U.S. at 346-47; Restatement (Second) of Torts § 580B(c) & cmt. c. The defendant's subjective belief is relevant to this question of fault, but "a mistaken belief in the truth of the matter published is not sufficient to amount to a bar" to liability. *Id.* § 581A cmt. h. Falsity, in other words, is an objective question; subjective belief is relevant only to scienter.

C. The common law of contracts and restitution likewise permit liability even without subjective falsity for misrepresentations of opinion.

Although securities fraud claims generally descend from the common law of misrepresentation and deceit, tort law's concept of fraudulent misrepresentation is not an ideal analog for § 11 of the Securities Act, because tort law requires scienter for fraudulent misrepresentation while § 11 does not. Contract law, by contrast, defines a "misrepresentation" simply as "an assertion not in accordance with the facts." Restatement of Contracts § 470(1) (1932). The commentary makes clear that "[m] isrepresentation of itself implies neither conscious error nor negligence on the part of the person making the misrepresentation. It may be innocent or known to be

false." *Id.* cmt. a.[7] The remedy for misrepresentation in contract—similar to the measure of damages in § 11 cases—is rescission and restitution.[8]

The common law of contracts makes clear that liability for misrepresentations involving statements of opinion is not limited to cases of subjective falsity. The first Restatement of Contract treats matters of opinion in § 474, which says that "[a] manifestation that the person making has no reason to expect to be understood as more than an expression of his opinion . . . is not fraud or a material misrepresentation, unless made by (a) one who has, or purports to have expert knowledge of the matter, or (b) one whose manifestation is an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion."

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7. *See also id.* § 471 cmt. b ("Misrepresentation without conscious fault, and even without negligence often has the same legal operation as fraud in giving the injured party a power of avoidance . . . ."). Fraud matters for the consequence of a misrepresentation; "materiality of the mistake induced by innocent misrepresentation is essential while materiality is not essential if a mistake induced by fraud produces the intended consequences." *Id.* § 476 cmt. b. Because § 11 of the Securities Act requires materiality as a separate element, misrepresentations that would otherwise support an action under the 1933 Act would generally entitle the purchaser to rescission in contract even without fraud.

8. *See* Restatement (Second) of Contracts § 376 ("A party who has avoided a contract on the ground of . . . mistake [or] misrepresentation . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.").

Id. § 474. This rule parallels the rule in tort, and it plainly does not depend on subjective falsity.[9]

Moreover, although the Restatement of Contracts acknowledges that "[s]tatements that things are 'good,' 'valuable,' 'large,' or 'strong,' necessarily involve an exercise of individual judgment . . . the boundaries of quality asserted by such statements . . . cannot be stretched indefinitely." *Id.* § 474 cmt. c.[10] Opinions are false, in other words, if they fall outside a zone of reasonableness. Finally, comment d specifically deals with misstatements of law. Although the general rule is that "[a] representation of a rule of law . . . is inoperative," the Restatement recognizes exceptions where the statement is made by "a lawyer to a layman, or by a person who may be supposed to have expert knowledge of the special rule to one who is ignorant of the subject." *Id.* § 474 cmt. d.

The common law of restitution is linked to that of contract; rescission and restitution, after all, is the remedy

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9. *See also* Restatement (Second) of Contracts § 168 cmt. d ("In some circumstances the recipient may reasonably understand a statement of opinion to be more than an assertion as to the maker's state of mind. . . . [I]f the statement of opinion relates to facts not known to the recipient, he may be justified in inferring that there are facts that justify the opinion, or at least that there are no facts that are incompatible with it. In such a case, the statement of opinion becomes, in effect, an assertion as to those facts and may be relied on as such.").

10. *See also* Restatement (Second) of Contracts § 168 cmt. d (recognizing that market practice accommodates some degree of adversariness and puffery, but even in arms-length transactions, "the other party is entitled to assume that a statement of opinion is not so far removed from the truth as to be incompatible with the facts known to the maker").

for misrepresentation in contract. Unsurprisingly, the first Restatement of Restitution includes a similarly capacious concept of misrepresentation. In many circumstances, "there is a right to restitution because of a mistake in the conferring of a benefit. The mistake may be one of law or of fact," and it "may be the result of the fraud or innocent inducement of the other party." Restatement of Restitution, Ch. 2 ("Mistake, Including Fraud"), Introductory Note (1937). Remedies are not, in other words, confined to circumstances involving scienter. Section 28 states a similar rule to the one in contract: "[a] person who has paid money to another because of a mistake of fact and who does not obtain what he expected in return is entitled to restitution from the other if the mistake was induced . . . by the fraud of the payee, *or* . . . by his innocent and material misrepresentation." *Id.* § 28 (emphasis added). Likewise, restitution is available in the event of a mistake of law if there is *either* fraud *or* "justifiable reliance upon an innocent misrepresentation." *Id.* § 55(b).

The Restatement of Restitution generally provides that representations of opinions are not fraudulent or material, but excepts situations similar to those in the Restatement of Contracts: "one standing in a fiduciary or confidential relation to the person to whom [the statement] is made"; "one who has, or purports to have, expert knowledge of the matter"; or "one whose manifestation is an intentional misrepresentation and varies so far from the truth that no reasonable man in his position could have such an opinion." *Id.* §8(3).

Longstanding rules of both contract and restitution, in other words, make clear that subjective falsity

is not a prerequisite for rescissionary remedies for misrepresentation, even when the misrepresentation concerns a matter of opinion. And, as discussed in the next section, the circumstances in which innocent statements of opinion are actionable track the special obligations that issuers of securities have to purchasers. Even if Congress had meant the Securities Act only to track the common law—rather than impose more rigorous obligations—it would not have not assumed that subjective falsity is required.

D. Registration statements fit the exceptions in which the common law imposed liability for opinion statements.

The general common law structure we have sketched involves a general principle that mere opinions are not actionable combined with a relatively broad range of exceptions to that principle. If it were generally true that statements involving opinions can be false only in a subjective sense—as Petitioners claim—then there would be only one exception, for opinions not sincerely held. But that is not the law. Rather, there are a number of exceptions that operate where the reasons for the general rule do not apply.

Those reasons are generally of three kinds: plaintiffs do not (or may not justifiably) rely on opinion statements; opinion statements are understood as part of a normal "bargaining game"; and opinion statements are not provably false. Dobbs, *supra*, § 477, at 1365. The established exceptions, on the other hand, capture those situations when reliance on a statement of opinion *is* reasonable because of the relationship between the speaker and the

recipient, the speaker's expertise or access to information, or the implication of underlying facts.[11]

Congress intended the Securities Act to change the rules of the "bargaining game" and to make the statements included in registration materials worthy of reliance. Moreover, by imposing due diligence and disclosure obligations on issuers and associated persons, Congress fostered the strong implication that issuers' statements rested on due investigation of the underlying facts.

First, the conclusions expressed in registration statements imply the existence of underlying facts. *Virginia Bankshares* recognized that this was frequently true of statements in securities documents generally; it is certainly true of Omnicare's broad but conclusory statement of legal compliance at issue here. The business judgment rule includes "a presumption that in making a business decision, the directors of a corporation acted on an informed basis." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). Corporate officers and directors, moreover,

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11. *See, e.g.*, 3 Samuel Williston, *The Law of Contracts* 2658 (1929):

> [I]f a misstatement of opinion does not ordinarily amount to actionable fraud it cannot be because the statement is one of opinion merely, for misstatements of opinion may be actionable; but rather because it is unreasonable to place reliance on such statements unless made by one who has, or purports to have, expert knowledge or peculiar means of information not accessible to the other party; and that it is assumed that no reliance was placed on the statements unless made by such a person.

have duties under state corporate law to supervise the corporation's legal and regulatory compliance. *See, e.g., In re Caremark, Inc. Int'l Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).[12] Readers of a registration statement thus may presume its statements, including statements about legal compliance, are informed by an adequate investigation of the facts and law.

Second, issuers of securities do stand in a relation of trust to prospective purchasers. Congress intended the 1933 Act to hold issuers to "high standards of trusteeship." H.R. Rep. No. 73-85 at 3 (1933); *see also* Shulman, *supra*, at 252 (observing that § 11 "has extended the reach of the duty . . . by denying "the defense available at common law that the defendant was under no duty to the plaintiff"). And as the United States points out in its brief, the statute itself adopts common law fiduciary obligations as the standard of reasonableness for the defenses in § 11(b)(3). *See* Brief for the United States as *Amicus Curiae* in Support of Vacatur and Remand, at 28 & n.5 (discussing 15 U.S.C. § 77k(c)).[13]

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12. *See also, e.g.*, Charles Hansen, *The ALI Corporate Governance Project: Of the Duty of Due Care and the Business Judgment Rule, a Commentary*, 41 Bus. Law. 1237, 1241 (1986) (noting that "[u]nder corporate law . . . due care must be used in ascertaining relevant facts and law before making the decision").

13. *See also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (stating that under the Investment Advisers Act of 1940, which likewise involves a "fiduciary" standard of care, "it would be logical to conclude that Congress codified the common law 'remedially' as the courts had adapted it to the prevention of fraudulent securities transactions by fiduciaries, not 'technically' as it has traditionally been applied in damage suits between parties to arm's-length transactions involving land and ordinary chattels").

Third, the defendants in § 11 actions necessarily enjoy much broader access to information about the company than do prospective purchasers. That is why the Act imposes broad disclosure obligations on issuers. And people involved in the preparation of the registration statement include not only the company's officers but also lawyers, auditors, and other financial professionals with extensive expert knowledge. This is thus a paradigm case in which recipients of opinion statements are entitled to rely on expert opinion. As one court noted, "[t]he essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do." *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943).

Finally, securities law incorporates principles, such as the good faith and due diligence defenses in § 11(b)(3), that afford breathing room to opinions about valuation, fairness, and other matters. These principles are bounded, however; they refute the notion that there is no such thing as an objective limit to opinions about securities matters. After all, Congress intended the securities laws to tighten the bounds of permissible salesmanship in the registration context. As the leading treatise puts it, "[t]he antifraud provisions are part of a statutory scheme that resulted from . . . a congressional determination that the public interest demanded legislation that would recognize the gross inequality of bargaining power between the professional securities firm and the average investor." Loss, *et. al.*, *supra*, at 434.

The common law background thus strongly suggests that Congress incorporated into the Securities Act the longstanding exceptions to the general rule that opinions

are non-actionable. And the continuing nuanced treatment of opinion statements in common law settings belies Petitioners' categorical insistence that such statements may be false only if they are not subjectively believed.

III. Statements of legal compliance are not matters of opinion in the same sense as other statements.

Much of the discussion in this case has equated statements of opinion in general with the statements of legal compliance at issue in this particular dispute. Statements about legal matters raise particular problems, however, and the law often treats them distinctly. Petitioners assert that "statements about legal compliance are by their very nature statements of opinion," Petitioners' Brief at 35 n.10, and that such statements "are necessarily infused with the issuer's judgment as to uncertain future events," *id.* at 33. Their categorical conclusion is that legal opinions are simply subjective predictions about unknowable future events:

> Legal compliance is undeniably a "matter of judgment." A legal opinion given today could change or be rendered obsolete tomorrow. An assertion of legal compliance cannot be definitively true or false at the time it is made except in the rare case in which a court has already definitively ruled on the legality of the issuer's actions. The ultimate accuracy of the stated belief hinges on future events and the decisions of judges, juries, and regulators. Assessing legal compliance thus calls for an exercise of judgment about unknowable future events.

Id. at 34-35. This is an extraordinary thing for lawyers to say about the law. It takes Justice Holmes' famous assertion that law is simply "the prophecies of what the courts will do in fact"[14] and adds a proposition that Holmes rejected—that is, that what the courts will do is in fact no more predictable than, say, whether the stock market will go up or down.[15]

If Petitioners are right that legal opinions simply cannot be *objectively* false—that they can be false only if they misrepresent the speaker's subjective belief—then it is unclear on what basis they can argue that the Sixth Circuit got the law wrong in this case. But Petitioners are *not* right. There are, to be sure, purely legal questions upon which the currently-existing legal materials do not provide a definitive answer, and there are also questions of the application of law to fact that inevitably involve the exercise of judgment. As scholars, *amici* endeavor to teach our classes in such a way as to identify both those areas where the law is settled and clear and those in which it is open to honest debate. But the existence of gray areas does not establish that gray is all there is.

In this case, Respondents alleged that Petitioners' statements that Omnicare was in compliance with applicable state and federal laws, and that in particular

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14. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897).

15. *See id.* at 461-62 (affirming that "[w]hen we study law we are not studying a mystery but a well known profession" and expressing optimism that legal thought can "make these prophecies more precise, and . . . generalize them into a thoroughly connected system").

its relationships with pharmaceutical companies were legal and valid, were false because Omnicare was in fact providing illegal kickbacks to those companies. Petitioners' statements of legal compliance might be understood as conveying one of three things: (1) that although kickbacks are illegal, Omnicare was not engaged in any version of that practice; (2) that although Omnicare was providing kickbacks, kickbacks are not illegal under the applicable law, or (3) that the relationships Omnicare had with pharmaceuticals did not amount to kickbacks. The first sense would amount to a representation of fact, even though stated as a matter of legal compliance. As such, it would be actionable if objectively false in the same sense as non-legal opinions that imply the existence of particular facts.

The second understanding of Petitioners' statements would be a pure statement about the content of the law, and the third a statement about the application of law to fact. Both (2) and (3) are opinions in the sense that they involve some degree of judgment. But the common law has long allowed reliance on such statements in circumstances analogous to those here. Moreover, doctrines throughout the law—from qualified immunity to Rule 11 of the Federal Rules of Civil Procedure—differentiate between legal opinions that are within the zone of legitimate disagreement and those that fall outside it.

Both the common law and the Securities Act provide specific tools to protect opinions on genuinely uncertain legal matters from incurring liability. But the law's content and its application are often knowable and determinate, and in these cases lawyers and other actors are frequently held liable if they misinterpret or misstate its commands.

It is accordingly open to this Court to decide this case in terms of the proper treatment of *legal* opinions under the Securities Act, without necessarily assimilating those opinions to other sorts of opinions, such as judgments whether a price is "high" or a transaction is "fair."

A. Statements of legal opinion often imply the existence of particular facts, misrepresentations of which may incur liability.

In tort, "the general rule is that, as between parties bearing no fiduciary relation to each other, a mere misrepresentation of law by one party, or a mere mistake of law by the other party, is no ground for relief." *Pieh v. Flitton*, 211 N.W. 964 (Minn. 1927). But like all statements of opinion, statements of legal opinion may imply the existence of certain facts. The statement that "I was in legal compliance with the speed limit on my way to work this morning," for example, would be understood as a statement of fact—that is, that the speaker was driving at a speed lower than the posted limit—rather than an opinion about the law, simply because the legal elements are both obvious and uncontested.[16] If the other elements of a misrepresentation claim were met, the false implication of fact would be sufficient to establish liability.

The common law of torts has long recognized that "[i]f a misrepresentation as to a matter of law includes, expressly or by implication, a misrepresentation of fact, the

16. The speaker would not ordinarily be understood to be saying, for instance, that he was in fact driving 100 mph but had a good faith belief that the posted speed limit was invalid under the Due Process Clause of the Fourteenth Amendment.

recipient is justified in relying upon the misrepresentation of fact to the same extent as though it were any other misrepresentation of fact." Restatement (Second) of Torts § 545; *see also Seeger v. Odell*, 115 P.2d 977, 980 (Cal. 1941) ("If . . . the opinion or legal conclusion misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation.").[17] This section treats statements of law as pure statements of opinion only "if all the pertinent facts are known and there is no misrepresentation of the existence or nonexistence of a pertinent statute or judicial decision." Restatement (Second) of Torts § 545 cmt. a. Courts acting in accord with this rule have held that when one party has special knowledge of the facts not available to the other, it will treat a statement of legal compliance as a representation of fact. *See, e.g., Sorenson v. Gardner*, 334 P.2d 471, 474 (Or. 1959) ("This is not a case to which the maxim that ignorance of the law excuses no one can be applied. The plaintiffs are not relying on their ignorance of the law but of the facts, and the alleged representations carried with them the implication that the facts were otherwise than the evidence shows them to have been."). Contract law applies an identical rule. *See* Restatement (Second) of Contracts § 170 cmt. b (acknowledging that a statement about the law "may, as may any other statement of opinion, carry with it the assertion that the facts known to the maker are not incompatible with his opinion, or that he does know facts that justify him in forming it").

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17. *See also* Restatement of Torts § 545 (articulating an identical rule); Dobbs, *supra*, § 478, at 1368 ("Some statements of law may actually state or at least imply facts that are provably false and if so they are actionable on the same grounds as other factual statements.").

On the facts of this case, Omnicare's statement that it was in legal compliance implied that it was not engaged in any practices that would plainly be illegal. The registration statement did not go into detail concerning Omnicare's relationships with pharmaceutical companies; it did not, in terms of the common law rule, provide a factual basis upon which the recipient of its statement could draw its own legal conclusions. This brings Omnicare within the rule of Restatement § 545—that is, it is liable if the facts implied by its representation of legality turn out to be objectively untrue.

B. Statements about the content or application of the law itself may be actionable under the common law, and they may be objectively false if they fall outside the bound of legitimate disagreement.

The general rule treating statements of law as non-actionable opinions applies more readily where the representation reflects a judgment about the content of the law or the proper application of that law to particular facts. That rule is not without exception, however; in fact, § 545 of the Restatement (Second) of Torts makes clear that "[i]f a misrepresentation as to a matter of law is only one of opinion as to the legal consequences of facts, the recipient is justified in relying upon it to the same extent as though it were a representation of any other opinion." Hence "[i]t is not universally true that a misrepresentation of the law is not binding upon the party who made it. . . . Where one who has had superior means of information professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant and has not been in a situation to become informed, the injured

party is entitled to relief as well as if the misrepresentation had been concerning matter of fact." *Rusch v. Wald*, 232 N.W. 875, 876 (Wis. 1930) (quoting 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 488 (1888)). Likewise, the general exceptions for speakers who stand in special relationships of trust to the recipient apply likewise to statements of law. *See* Bigelow, *supra*, at 488.

Moreover, the common law of torts imposes special obligations on lawyers. The Restatement (Second) of Torts cites *Sainsbury v. Pennsylvania Greyhound Lines, Inc.*, 183 F.2d 548 (4th Cir. 1950), which noted that "[t]he rule is also well established that when a lawyer makes a misrepresentation of law to a layman relief may be afforded, even though the layman knows the lawyer represents an antagonistic interest. Any other rule would be unconscionable." *Id.* at 550-51 (citing *Rusch*, 232 N.W. at 876, and Restatement of Torts § 545 cmt. d (1938)).[18] When a stock registration statement, often written by and certainly reviewed by lawyers, purports to offer a judgment on the legality of the issuing company's activities, laypersons are entitled to rely on that judgment.

Contract law likewise does not distinguish in principle between misstatements of fact and misstatements of law. Section 170 of the Restatement (Second) of Contracts, which is based on § 545 of the Restatement (Second)

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18. *See also* Dobbs, *supra*, § 478, at 1368 ("If false and uttered by a lawyer as an expert, [statements of opinions about legal consequences of a given action] may be actionable as false statements of fact because they imply that the lawyer both holds the opinion *and has a basis for it*; uttered by a layman who has no special knowledge or fiduciary obligation it is probably protected as opinion.") (emphasis added).

of Torts, maintains that "[i]f an assertion is one as to a matter of law, the same rules that apply in the case of other assertions determine whether the recipient is justified in relying on it." Contract law, like tort law, imposes special obligations on lawyers and persons purporting to apply legal expertise. *See id.* cmt. b ("[I]f the maker of the representation purports to have special expertise in the law which the recipient does not have, reliance on the opinion may be justified (§ 167(b)). If a lawyer states his opinion of law to a layman, the layman is entitled to assume his professional honesty and may justifiably rely on his opinion even though the two have an adverse relation in negotiating a contract. Even if the maker is not a lawyer, he may purport to have special knowledge that will enable him to form a reliable opinion. . . .").

Courts have been skeptical, moreover, of the proposition that statements of legal compliance amount to statements of opinion at all, at least in ordinary circumstances. In *Municipal Metallic Bed Mfg. Corp. v. Dobbs*, 171 N.E. 75 (N.Y. 1930), for example, the New York Court of Appeals held that a tenant could sue based on a landlord's misrepresentation that manufacturing was a lawful use of the property. In that case, the court wrote, "we have something more than a representation of law which is to be taken as the expression of an opinion only. The landlords assume to guarantee that their building may lawfully be used for the purposes for which it was leased. If any presumption exists, it is that the landlord knows whether his building complies with the zoning laws and factory regulations. The tenant is not left to his own judgment, but may rely on the contract of the landlord." *Id.* at 76. The same court later read this opinion to exemplify "a sharp distinction between a pure opinion of law which

may not, except in unusual circumstances, base an action in tort, and a mixed statement of fact as to what the law is or whether it is applicable." *Nat'l Conversion Corp. v. Cedar Building Corp.*, 246 N.E.2d 351, 355 (N.Y. 1969); *see also Crowther v. Guidone*, 441 A.2d 11, 13 (Conn. 1981) ("To require the representation to be made as a statement of fact . . . is quite different than to require that the statement be factual as opposed to legal.").

This skepticism makes sense, because in many instances a statement about the content of the law or its application to particular facts is not a matter of legitimate dispute. The statement "the speed limit on that highway is 55 miles per hour" is a statement of fact notwithstanding that it concerns the content of the law. Likewise, the statement that "the police's warrantless use of thermal imaging to look inside a private residence is unreasonable under the Fourth Amendment" is not simply a statement of opinion, because this Court has settled that question. *See Kyllo v. United States*, 533 U.S. 27 (2001). Before *Kyllo*, however, the same statement might well have been properly viewed as a matter of opinion. The extent to which statements of law should be treated as opinion or fact depends largely on how settled the law and its applications are in particular areas.

Contrary to Petitioners' suggestion, the law does *not* simply throw up its hands in the face of some degree of legal indeterminacy and treat all legal questions as open to dispute. The jurisprudence of qualified immunity, for example, demonstrates the law's ability to distinguish between legitimate legal uncertainty and "clearly established law." *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Likewise, courts impose sanctions

on attorneys for failing to cite controlling adverse precedent under Fed. R. Civ. P. 11 notwithstanding that "attorneys are legitimately entitled to press their own interpretations of precedent, including interpretations which render particular cases inapplicable"; sanctions are justified when these efforts pass the bounds of legitimate argument. *Jorgenson v. Cty. of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988). And Congress has instructed federal courts entertaining habeas corpus petitions to identify state court decisions that "involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 409 (2000) (clarifying that the inquiry is whether the state court's decision was "objectively unreasonable"). Each of these standards requires the courts to respect an area of legitimate disagreement—one in which lawyers may hold differing opinions about the content or the application of the law—but also to police its outer boundaries.

This Court currently has before it a case involving whether a police officer may base "reasonable suspicion" upon a mistake of law. *See Heien v. North Carolina*, No. 13-604. *Amici* express no view on the proper resolution of that case. We note, however, that even North Carolina concedes both that the reasonableness of the officer's mistake is an objective question and that mistakes of law should be excused only within narrow bounds. *See* Brief for the Respondent at 16-17, *Heien v. North Carolina*, No. 13-604 (July 2014). North Carolina does *not* maintain that legal judgments are simply matters of opinion. Judgments about the law can be true, false, or sometimes uncertain, and all across the law—from tort to contract to qualified immunity to *habeas*—courts manage to tell the difference.

C. The securities laws contain ample mechanisms for protecting legal opinions on legitimately contested questions.

The examples given show that courts can determine the existence and boundaries of legitimate legal disagreement. Those examples should not, of course, determine the proper standard for assessing such disagreement under the securities laws. Qualified immunity jurisprudence is quite protective of defendants' erroneous legal judgments for very good reasons: the defendants generally are not lawyers; they must make on-the-spot legal judgments under difficult conditions; and the costs of over-deterrence are high. Likewise, Rule 11 applies a gentle standard in order to encourage vigorous advocacy, and § 2254(d) shields state courts' applications of law to fact for federalism reasons.

Section 11 of the Securities Act, however, exists at the opposite end of the spectrum from these examples. It applies only to statements included in the registration statement—a highly formal document painstakingly prepared and reviewed by numerous professionals, including skilled attorneys. As already discussed, Congress intended to impose a strong obligation of due diligence in the preparation of these statements; hence the imposition of strict liability for erroneous or misleading statements in the registration materials. And state corporate law imposes additional obligations of investigation and oversight. The reasons for according relatively broad leeway for erroneous legal judgments by, say, a cop on the beat do not apply here.

Section 11 also has a built-in mechanism for shielding persons other than the issuer itself from liability based on good-faith judgments about uncertain questions of law. Section 11(b)(3) provides a complete defense to liability for persons who, "after reasonable investigation, have reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true." *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 & n.26 (1976).

This Court need not determine the precise degree of uncertainty necessary to render a statement of legal compliance a non-falsifiable opinion under § 11. Petitioners moved to dismiss on the ground that failure to allege Omnicare's statements of legal compliance were subjectively false disposed of Respondents' claims. *See* Respondents' Brief at 56-58. That is plainly incorrect. The parties have not yet litigated whether the legal compliance issues presented by this particular case fall within a zone of legal ambiguity such that Omnicare's statements amounted to pure opinion. Nor have they litigated whether Omnicare's statements implied certain underlying facts or fell into one of the other well-recognized categories in which even opinion statements are actionable. It is sufficient to resolve this appeal that, contrary to Petitioners' view, statements of legal compliance may involve assertions that are objectively falsifiable.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

JAMES J. SABELLA
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
(646) 722-8520

ERNEST A. YOUNG
Counsel of Record
203 Strolling Way
Durham, NC 27707
(919) 360-7718
young@law.duke.edu

DARREN CHECK
KESSLER, TOPAZ, MELTZER,
& CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Counsel for Amici

September 2, 2014

AMICUS CURIAE BRIEF

No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., ET AL.,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* INSTITUTIONAL INVESTORS SUPPORTING RESPONDENTS

MAX W. BERGER
BLAIR A. NICHOLAS
SALVATORE J. GRAZIANO
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
T: 212-554-1400
MWB@blbglaw.com
BlairN@blbglaw.com
Salvatore@blbglaw.com

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL LLP
1325 G St., N.W.
Suite 500
Washington, D.C. 20005
T: 202-652-4511
jmassey@masseygail.com

Dated: September 2, 2014

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is filed by more than 40 institutional investors – including many of the largest public pension funds in the world – that collectively manage approximately $2 trillion of assets on behalf of over 15 million individuals.[1] A substantial portion of these assets is invested in securities purchased in public offerings and registered under the Securities Act of 1933. Consequently, *amici* have a vital interest in the proper interpretation of Section 11 of the Securities Act, 15 U.S.C. § 77k, which authorizes private suits when a registration statement contains any "untrue statement of a material fact" or "omit[s] to state a material fact" that is "necessary to make the statements therein not misleading . . . ."

A listing and descriptions of the *amici* joining this brief can be found in the Appendix, *infra*.

SUMMARY OF ARGUMENT

This Court should hold that Section 11 does not require a plaintiff to show that the maker of a statement of opinion subjectively believed it to be false. Deceptive intent is not a necessary condition for a violation of Section 11. This Court should make clear that an opinion can violate Section 11 without

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for a party authored any part of this brief, and no person other than *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters from all parties consenting to the filing of the brief are on file or have been submitted to the Clerk of the Court.

a showing that the maker of the statement did not subjectively believe the opinion.

Such a rule is vital to protect the interests of institutional investors, whose importance both in the effective functioning of this nation's securities markets and in securities litigation has been repeatedly recognized by Congress. Institutional investors contribute a substantial majority of the capital invested in the nation's securities markets. Congress endorsed a leading role for institutional investors in the private enforcement of the federal securities laws in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). Congress recognized that institutional investors have a strong interest in enforcing the securities laws, as well as a long-term perspective that aligns their interests with those of the companies in which they invest.

Petitioner Omnicare asks this Court to create a rule that would immunize statements of opinion in registration statements unless a plaintiff can adequately allege (and then prove) that the maker of the statement did not subjectively hold the opinion. According to Omnicare, liability should turn solely on the "psychological fact" of the speaker's belief. Pet. Br. 16 (quoting heading).

Such a rule would significantly harm investors. In most cases, it would be extremely difficult or even impossible to establish the subjective state of mind of the person making the relevant statement. Institutional investors typically lack any knowledge as to the "psychological fact" of the speaker's belief and instead rely on the objective meaning of information provided in registration statements.

Hence, Omnicare's proposal would change Section 11 from a straightforward remedy, which this Court has held imposes a relatively minimal burden on plaintiff investors, to a complex recipe for costly litigation. In many cases, proving a subjective state of mind would be not only time-consuming, but utterly infeasible.

Omnicare's proposal would also invite gamesmanship. Virtually any statement can be labeled an "opinion" by the simple artifice of adding a phrase such as "we believe" (as the statements at issue in this case illustrate). Such semantic sleights of hand could transform almost any provision of a registration statement (even financial line items) into an "opinion" requiring a plaintiff to show that the author of the statement did not subjectively believe it to be true. This would eviscerate Section 11 and the legislative scheme for liability in public offerings.

Further, Omnicare's change would reduce the usefulness and integrity of registration statements. Rather than being able to take the information in registration statements at face value, institutional investors would confront the danger that issuers and others would have less incentive to ensure the truthfulness of the representations in registration statements, because they could claim immunity for any "opinion" they sincerely held. Rather than placing a premium on accuracy in registration statements, Omnicare's version of Section 11 would reward ignorance on the part of issuers, who could genuinely claim "sincere belief" only if they avoided a thorough investigation of the facts. At a minimum, institutional investors would incur additional costs of independent verification, by probing into

supporting data and evidence to verify as best they could the "opinion"-linked information in registration statements.

These additional burdens on investors – which would seriously disrupt the careful design of the Securities Act's scheme for public-offering responsibilities and liability – could translate into a decreased willingness to invest in public offerings, distorting the securities markets and reducing the availability of capital for entrepreneurs and innovative businesses. The operation of U.S. capital markets would be impaired if investors believed that registration statements could not be trusted or if no feasible remedy were available for misstatements and omissions couched in terms of an opinion.

Further, many institutional investors have large amounts invested in passive strategies, such as index funds. These strategies are enormously popular with investors and account for trillions of dollars in assets under management. Indexed investments rely categorically on the integrity of the financial markets; indeed, they assume market prices are fundamentally fair and the market cannot be beat. Any reduction in the trustworthiness or reliability of registration statements would greatly impair the effectiveness of indexed investments and other passive investment strategies.

Omnicare and its *amici* contend that this Court should impose a subjective-intent requirement in Section 11 because securities litigation has harmful economic effects. Yet this Court recently rejected similar policy arguments in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) ("*Halliburton II*"), holding that they were more

properly addressed to Congress. The same result is warranted here.

Omnicare's *amici* claim that the risk of securities-law liability has depressed the number of public offerings in U.S. capital markets. But far from weakening capital markets, liability exposure for material misstatements in public offering materials strengthens and maintains the integrity of U.S. capital markets. Studies show that, when legal regimes fail to protect investors, robust capital markets fail to develop adequately because investors lack the assurances necessary to entrust their capital to management. Simply put, investors fear fraud much more than they fear securities litigation.

If the number of U.S. initial public offerings has declined (and the experience of 2014 shows otherwise), any such decline would be due to the increasing globalization of financial markets, not the level of U.S. securities regulation. If anything, American legal protections for investors cause U.S. markets to be a more attractive location for IPOs.

Finally, concerns expressed by underwriters and auditors as to their potential Section 11 liability are misplaced and have already been accommodated by Congress. Section 11 imposes a different standard of liability on auditors and underwriters than it does on issuers, and affords auditors and underwriters a "due diligence" defense. It would be inappropriate to award them an additional immunity from liability based on subjective intent. Auditors and underwriters are obligated, and in a far better position, to investigate the information in a registration statement than are investors, who are instead entitled to rely on the information's

accuracy. Further, the imprimatur of underwriters and auditors is often critical to an IPO's success. Because of the vital role played by auditors and underwriters in registered securities offerings, and because the registration process is integral to the statutory scheme, the standard of care imposed by Section 11 on auditors and underwriters is entirely appropriate.

The judgment below should be affirmed.

ARGUMENT

I. OMNICARE'S RULE OVERLOOKS THE SPECIAL ROLE THAT CONGRESS HAS ACCORDED INSTITUTIONAL INVESTORS.

A. Congress Has Recognized The Important Role Of Institutional Investors In Securities Markets And Securities Litigation.

Amici have an important perspective on the proper interpretation of Section 11. In the aggregate, pension funds that invest in U.S. markets cover tens of millions of active and retired members and control trillions of dollars in assets. Each year these funds invest billions of additional dollars in the U.S. capital markets on behalf of their beneficiaries.

Institutional investors have a long-term outlook on the companies in which they hold securities. They have no incentive to support meritless securities litigation, which only harms their own investments, but they do have a strong interest in ensuring accurate disclosures in public offerings of securities, deterring misrepresentations from infecting the capital markets, and holding wrongdoers

accountable. Their overriding responsibility is to invest for the retirement and long-term security of tens of millions of active workers and retirees across the United States and internationally.

Because institutional investors are typically under a fiduciary obligation to protect the investments they make on behalf of their millions of beneficiaries, these *amici* have a particularly significant interest in the requirements for lawsuits to redress violations of the federal securities laws. Indeed, it is doubtful whether any party has a greater stake in the requirements for securities actions than institutional investors.

Further, many state and local governments are constitutionally obligated to guarantee defined-benefit retirement plans. Therefore, in many cases, taxpayers would bear the ultimate costs if investment funds suffered losses due to the malfeasance of public securities issuers and their executives.

Congress has recognized the important perspective of institutional investors and endorsed a leading role for them in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995). The PSLRA creates a rebuttable presumption for the appointment as lead plaintiffs of investors with the largest financial interest in the relief sought by the class. In the PSLRA, Congress acted "to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs" in securities class actions. *Tellabs, Inc. v.*

Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007).

This reform was designed to encourage the selection of institutional investors as lead plaintiffs precisely because they are "deemed to have a large enough financial interest in the litigation and sufficient professional expertise in directing litigation to ensure that class members' interests are competently and dutifully served." Mary K. Kane, *et al.*, WRIGHT & MILLER ON FEDERAL PRACTICE & PROCEDURE § 1806 at n.22 (2012). "Institutional investors, [Congress] believed, are less likely to bring abusive or meritless litigation." *Id.* at n.23.

Thus, institutional investors have an important and congressionally recognized interest in ensuring that meritorious securities litigation remains a viable tool.

B. Section 11 Provides An Important Remedy For Institutional Investors.

The Securities Act of 1933 requires the preparation and filing of registration statements in connection with public offerings of securities. *See* 15 U.S.C. § 77e. The 1933 Act "was designed to provide investors with full disclosure of material information concerning public offerings." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). Indeed, "[t]he primary innovation of the 1933 Act was the creation of federal duties—for the most part, registration and disclosure obligations—in connection with public offerings." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995).

Registration statements play a critical role in public offerings. They are lengthy documents filed with the SEC and available online, whose function is to disclose important financial and other information that provides a key foundation for millions or billions of dollars' worth of investment decisions. As this Court has noted, "[t]he potential impact on shareholders of false or misleading registration statements needs no elaboration." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1173 (2014).

Section 11 of the 1933 Act creates an express cause of action for persons acquiring securities issued under a registration statement that "contained an untrue statement of a material fact" or "omitted to state a material fact . . . necessary to make the statements therein not misleading . . . ." 15 U.S.C. § 77k(a). Section 11 "was designed to assure compliance with the disclosure provisions of the [Securities] Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & Maclean v. Huddleston*, 459 U.S. 375, 381-82 (1983) (footnote omitted). A plaintiff "need only show a material misstatement or omission" in the registration statement "to establish his *prima facie* case." *Id.* at 382. Section 11 is targeted and "limited in scope" – for example, it pertains only to registration statements and contains a one-year statute of limitations, 15 U.S.C. § 77m – but it "places a relatively minimal burden on a plaintiff." *Herman & Maclean*, 459 U.S. at 382. As this Court has explained, "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements," while other defendants, including

auditors and underwriters, may assert a defense of "due diligence." *Id.*

Decades of industry practice under this legal framework have created the settled expectation among institutional investors that registration statements will be accurate and, if not, that a streamlined and efficient remedy will be available under Section 11. Just as investors typically rely on the integrity of the market price in making their investment decisions, *see Halliburton II*, 134 S. Ct. at 2410, so too they assume the accuracy and integrity of registration statements in connection with public offerings. Indeed, the operation of U.S. capital markets would be substantially impaired if investors believed that registration statements could not be trusted or if no practical remedy were available for misstatements and omissions in public offering materials.

C. Omnicare's Proposal Would Impose A Substantial Burden On Institutional Investors.

Omnicare proposes to immunize statements of opinion in registration statements unless a plaintiff can allege (and then prove) that the maker of the statement did not subjectively hold that opinion. According to Omnicare, liability should turn solely on the "psychological fact" of the speaker's belief. Pet. Br. 16 (quoting heading).

Omnicare's proposed rule should be rejected. It would significantly burden institutional investors, which typically lack knowledge as to the "psychological fact" of the speaker's belief. Institutional investors rely on the objective meaning of representations in registration statements, and it

would usually be infeasible for them to investigate and develop proof regarding the subjective state of mind of the persons in question, particularly at the pleading stage. Given the standard of *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–63 (2007), securities plaintiffs would likely face the argument that they are required to plead specific evidence making the allegation of subjective disbelief plausible, which might be particularly difficult at the outset of a case, without the benefit of any discovery. *Cf.* Pet. App. 9a (applying heightened pleading standards of Fed. R. Civ. P. 9(b) to the plaintiff's claims in this case).

The House Report accompanying the 1933 Act recognized the danger to investors:

> Every lawyer knows that with all the facts in the control of the defendant it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of the defendant. Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omissions or commission on those who purport to issue statements for the public's reliance.

H.R. Rep. No. 85, 73d Cong., 1st Sess., at 9 (1933).

Indeed, for nearly two centuries, this Court has recognized that a drawback of an intent standard is "the extreme difficulty of ascertaining what is, *bona*

fide, the interpretation of the party." *Barlow v. United States*, 32 U.S. 404, 411 (1833).[2]

That other areas of the law may involve inquiries into subjective intent is immaterial. Section 11 reflects Congress's decision to provide an effective enforcement mechanism for investors injured by violations of the requirement of accurate registration statements in public securities offerings. Thus, the whole point of Section 11 is to provide a prompt and efficient remedy for violations that "places a relatively minimal burden on a plaintiff." *Herman & Maclean*, 459 U.S. at 382. Yet Omnicare's

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[2] *See also, e.g., McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1445 (2014) (noting the "difficult[y]" of applying a standard based on "subjective intent" to political contributions) (internal quotation marks omitted); *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 744 (2013) (agreeing with "the need to eliminate the consideration of evidence of subjective intent" in the definition of "vessel"); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011) ("we have almost uniformly rejected invitations to probe subjective intent" under Fourth Amendment); *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011) ("The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective."); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150 (2009) ("[I]t is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent."); *Saenz v. Roe*, 526 U.S. 489, 517 (1999) (Rehnquist, C.J., dissenting) ("It is simply unworkable and futile to require States to inquire into each new resident's subjective intent to remain."); *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (legislative immunity does not turn on "subjective intent"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified-immunity test is objective and seeks to "minimize" "the inquiry into officials' subjective intent").

proposal would fundamentally change the nature of Section 11.

The problem is aggravated by the fact that Omnicare's proposal invites semantic gamesmanship. Virtually any statement of fact can be transformed into an "opinion" by simply adding a phrase such as "we believe" (as the statements at issue in this case illustrate). Omnicare's position would invite issuers and others to use verbal tricks to label almost anything in a registration statement (even a financial line item) an "opinion" requiring a plaintiff to show that the author of the statement did not subjectively believe it to be true.

The investment strategies of institutional investors are built on the cornerstone assumption that United States securities markets are fundamentally fair and public securities filings are truthful. If this Court were to adopt Omnicare's proposal, it would create substantial risk to institutional investors by inventing a potentially sweeping immunity under Section 11 for any person who could assert that he or she sincerely held the opinion in question, even if it lacked any reasonable basis. An institutional investor could well find it quite difficult and very burdensome to overcome such a defense, because it is grounded in the person's subjective belief rather than objective indicia of truth or falsity.

Further, the utility of registration statements would be undermined. Institutional investors would face the risk that issuers and others would have less incentive to ensure the truthfulness of the representations in registration statements, because they could claim immunity for any "opinion" they

sincerely held. Indeed, an issuer that engaged in a full and thorough investigation of the facts would only imperil its ability to assert a defense of "sincere belief" under the new subjective standard. Hence, rather than placing a premium on accuracy and full disclosure in registration statements, Section 11 would reward ignorance on the part of issuers.

At a minimum, institutional investors would incur additional costs to probe further on their own into supporting data and evidence, to verify as best they could the information in registration statements. Section 11's purpose, to encourage investors to take representations in registration statements at face value, would be defeated.

These additional burdens on institutional investors could translate into a reduced willingness to invest in public offerings, distorting the securities markets and reducing the availability of capital for entrepreneurs and innovative businesses.

Moreover, many institutional investors rely on passive strategies, such as index funds, for their investment decisions. Such strategies – which are enormously popular with investors and account for trillions of dollars in assets under management[3] – assume the integrity of the financial markets and

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[3] *See, e.g.*, Investment Company Institute, 2014 Investment Company Fact Book; A Review of Trends and Activities in the U.S. Investment Company Industry (54th ed.) pp. 42, 44, http://www.icifactbook.org/pdf/2014_factbook.pdf (noting that "[a]s of year-end 2013, 372 index funds managed total net assets of $1.7 trillion" and "[d]emand for index domestic equity mutual funds more than tripled in 2013" while "[i]n contrast, actively managed domestic equity mutual funds experienced a net outflow of $575 billion" from 2007 to 2013)).

"the security's market price as an unbiased assessment of the security's value in light of all public information." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013). Indeed, indexed investing is a prototypical example of an investment strategy that relies on the integrity of market prices because it assumes market prices are fundamentally fair and the market cannot be beat. Accordingly, any reduction in the trustworthiness or reliability of registration statements would greatly impair passive investment strategies.

This Court has consistently — and often unanimously — opined that "private securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." *Tellabs*, 551 U.S. at 321 n.4 (8-1); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (8-0 vote). In fact, private enforcement has resulted in larger recoveries than SEC action. For example, in the Enron fraud, the SEC recovered $440 million while investors recovered approximately $7.2 billion from private suits.[4] The SEC settlement fund in connection with WorldCom was $750 million – at the time the largest in the agency's history – compared to $6.1 billion recovered in the private action.[5] Notably, the private

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[4] *Compare* Securities and Exchange Comm'n, *Enron*, www.sec.gov/divisions/enforce/claims/enron.htm *with* Kristen Hays, "Enron Settlement: $7.2 Billion to Shareholders," HOUS. CHRON., www.chron.com/business/enron/article/Enron-settlement-7-2-billion-to-shareholders-1643123.php (Sept. 9, 2008).

[5] *Compare* AccountingWeb, "$750 Million MCI/WorldCom Settlement is Largest in SEC History,"

settlement with WorldCom included $24.75 million from individual directors while the SEC fine was paid only by the company.[6] The SEC did not recover anything for investors in the Cendant litigation, but the private action recovered $3.2 billion.[7] Similarly, while the SEC settled with Charter Communications in return for a cease-and-desist promise not to violate the securities laws again, the private lawsuits were settled for a $64 million cash fund and an $80 million equity distribution.[8] Empirical research shows that private class actions are more effective than SEC investigations in policing securities fraud.[9]

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www.accountingweb.com/topic/750-million-mciworldcom-settlement-largest-sec-history (July 7, 2003) *with Settlements*, www.worldcomlitigation.com/html/citisettlement.html. The website www.worldcomlitigation.com is the information site administered by Lead Counsel in the *WorldCom* matter.

[6] AccountingWeb, *supra*; www.worldcomlitigation.com, *supra*.

[7] *See In re Cendant Corp. Litig.*, 264 F.3d 201, 217 (3d Cir. 2001).

[8] *Compare* Business Wire, "Charter Communications Reaches Settlement in Class Action and Derivative Lawsuits," www.businesswire.com/news/home/20040805005892/en/Charter-Communications-Reaches-Settlement-Class-Action-Derivative (Aug. 5, 2004) *with* Stipulation of Settlement, ECF No. 292, *In re Charter Comm'cns, Inc., Sec. Litig.*, No. 02-cv-1186, §1.26 (E.D. Mo. Feb. 17, 2005).

[9] *See* Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, University of Michigan Law School, Law & Econs. Research Paper Series, No. 12-022, Aug. 2014, *available at* ssrn.com/abstract=2109739.

This Court has warned of "plac[ing] an unnecessarily unrealistic evidentiary burden" on securities plaintiffs. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("*Halliburton I*") (citations, quotation marks, and brackets omitted). The securities laws embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry" and should be construed "to effectuate [their] remedial purposes." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186, 195 (1963). *Accord Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

Congress has consistently legislated against these background principles in enacting the PSLRA and other securities legislation. Omnicare's proposal is inconsistent with this Court's longstanding approach to the interpretation of remedies under the securities laws.

II. OMNICARE'S POLICY ARGUMENTS ARE MISGUIDED.

Omnicare and its *amici* contend that this Court should impose a subjective-intent requirement on Section 11 because securities litigation has harmful economic effects. *See* Pet. Br. 32-38; Sec. Indus. & Fin. Mkts. Ass'n Br. 12-14; Chamber of Commerce Br. 21-26; Center for Audit Quality Br. 8-20. These objections have no merit.

A. Omnicare's Policy Concerns Are Recycled Versions Of Arguments Recently Rejected By This Court In *Halliburton II*.

As an initial matter, the arguments of Omnicare and its *amici* echo the policy concerns raised only a few months ago by Halliburton, which urged this Court to abandon the "fraud on the market presumption" of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), on the ground that it "produce[d] a number of serious and harmful consequences," including "impos[ing] excessive costs on businesses." *Halliburton II*, 134 S. Ct. at 2413.

This Court rejected those objections: "These concerns are more appropriately addressed to Congress, which has in fact responded, to some extent, to many of the issues raised by Halliburton and its *amici*." *Id.* In *Halliburton II*, this Court noted that Congress has enacted the PSLRA, which sought to combat perceived abuses in securities litigation, and the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227. This Court concluded that "[s]uch legislation demonstrates Congress's willingness to consider policy concerns of the sort" raised by Halliburton. 134 S. Ct. at 2413.

Precisely the same reasoning is applicable here. In fact, *Halliburton II*'s reference to the PSLRA is highly instructive: Instead of restricting Section 11 as Omnicare proposes, Congress in the PSLRA imposed a special subjective-knowledge requirement only with respect to certain "forward-looking" statements of opinion concerning the future. *See* 15 U.S.C. § 77z–2. In that provision, Congress addressed the question when subjective disbelief should be the appropriate standard, and when it should not be. Petitioner seeks to overturn the balance struck by Congress and apply the "subjective intent" standard throughout Section 11.

Moreover, the PSLRA deliberately favored institutional investors, as noted at pp. 7-8, *supra*. Congress *encouraged* institutional investors to take a leadership role in securities litigation because they "do not represent the type of professional plaintiff this legislation seeks to restrict." H.R. Rep. No. 104-369, at 35 (1995). "Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs*, 551 U.S. at 321 n.4 (quoting *Merrill Lynch v. Dabit*, 547 U.S. at 81).

B. Omnicare's Proposed Immunity Would Impair The Integrity Of Capital Markets.

Even if this Court were to consider the policy arguments of Omnicare and its *amici*, they lack merit. For example, the *amici* claim that the risk of securities-law liability has reduced the number of public offerings in U.S. capital markets. But they

have failed to identify the relevance of their argument for this case. They cannot demonstrate any plausible link between Section 11 *specifically* and what they claim to have identified as a reduced number of offerings. Certainly, given that Omnicare argues that the Second, Third, and Ninth Circuits have adopted its rule, *see* Pet. for Cert. i, 8-13, it is curious for its own *amici* to maintain that the decline in U.S. public offerings is already occurring. If that decline is happening now, while Omnicare's rule is already in force in the nation's largest financial markets, then the decline has little if anything to do with judicial interpretations of Section 11.

In any event, far from weakening capital markets, legal liability for untrue registration statements strengthens the markets and encourages investment by maintaining market integrity. Omnicare's *amici* focus on only half of the equation: the issuers deciding where to list. *See* Chamber of Commerce Br. at 23 (cost of doing business in the United States was "of real concern to corporate executives" (internal quotation marks omitted)). They ignore the other side of the equation – investors, who must be confident in the integrity of the market to be willing to purchase securities in public offerings, and that confidence requires strong enforcement of the securities laws. "The securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (internal citation omitted).

Studies show that, when legal regimes fail to protect investors, capital markets fail to develop

adequately, because investors lack the assurances necessary to entrust their capital to entrepreneurs and management. Simply put, investors fear fraud much more than they fear securities litigation.[10] Robust free markets work well only when investors feel confident enough to take business risks without the added fear of fraud:

> [R]ecent research documents significant adverse consequences of the failure of a legal regime to protect investors. . . . [W]hen investor protection is poor, investment funds are not allocated efficiently across activities . . . , since entrepreneurs with profitable projects need not be the ones with access to funds and investors do not entrust their funds to entrepreneurs. These failures of markets to work well have significant real consequences. . . . [P]oor investor protection policies, through their adverse effects on capital market development, retard economic growth.[11]

Empirical studies of capital formation validate the connection between investor protection and capital formation. A study by Jonathan M. Karpoff of the University of Washington, D. Scott Lee of the University of Nevada, Las Vegas, and Gerald S. Martin of American University examined private

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[10] Joel Seligman, The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority," 108 HARV. L. REV. 438, 439-42 (1994).

[11] Andrei Shleifer, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE, at 1984 (Oxford 2000) (citations omitted).

enforcement actions between 1978 and 2004 and concluded: "Contrary to many criticisms of private lawsuits and regulatory actions, we find that legal penalties are highly systematic, and in particular, are positively related to the size and severity of the harm from the misconduct."[12] Further, the study noted the positive impact on capital markets: "[P]rivate enforcement – in particular, the ability to seek recompense through legal actions – is strongly correlated with financial market development."[13]

Another study focusing on Europe, conducted by scholars at the National Bureau of Economic Research (NBER), the Wharton School (University of Pennsylvania), and the Booth School of Business (University of Chicago), showed a similar strengthening of market liquidity as regulations tightened.[14] The cost of capital decreased as a result of regulation, and the researchers' results "suggest that improving key elements of securities regulation leads to substantial capital-market benefits."[15]

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[12] Jonathan M. Karpoff, *et al.*, *The Legal Penalties for Financial Misrepresentation*, at 1 (May 2, 2007), *available at* http://ssrn.com/abstract=933333. .

[13] *Id.* at 3.

[14] Hans B. Christensen, *et al.*, Capital-Market Effects of Securities Regulation: Hysteresis, Implementation, and Enforcement, at 3 (Nov. 2011). ("[W]e find that market liquidity increases when new market abuse . . . and transparency . . . regulation come into force, using both bid-ask spreads and the percentage of zero-return days. The estimated liquidity improvements are economically significant."), *available at* https://bspace.berkeley.edu/access/content/group/e675b947-6067-425e-adbf-10e8922547b9/CHL%20Enforcement.pdf.

[15] *Id.* at 3.

Importantly, the effects shown in this study "ha[ve] immediate capital-market effects (even before the first enforcement action)."[16] In addition, considering European regulation allowed the researchers to examine the effects at different points in time, due to staggered implementation, rather than the effects of major regulatory events such as the Sarbanes-Oxley Act.[17] The ultimate findings "support *a causal link* between stricter securities regulation and market liquidity."[18]

C. Any Declines In IPO Activity Are Not Caused By Securities Regulation.

Nevertheless, Omnicare's *amici* complain that excessive securities regulation has resulted in a decline in U.S. initial public offerings (IPOs). But in the context of increasingly global financial markets, "[i]t is hardly a surprise . . . that competition has eroded the U.S.' once massive advantage [in IPOs] for reasons unrelated to regulation except for the increasing quality of what other countries are doing."[19] For example, few would be surprised that the rise of Chinese companies has led to an increase in offerings in China. Indeed, the surprising

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[16] *Id.* at 8. The finding complements the conclusions from Karpoff's study, *see* nn. 12-13 *supra* and accompanying text. Both *ex ante* and *ex post* securities regulations strengthen capital markets.

[17] *Id.* at 1.

[18] *Id.* at 35 (emphasis added).

[19] Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 194-95 (2008).

phenomenon has been the number of Chinese companies seeking *to list in the United States.*[20]

Economic research shows that swings in IPO levels are "hypersensitive to changes in market conditions."[21] Worries about the competition between New York and London for public offerings were rendered "largely obsolete" because of the financial crisis of 2008-2009, and at any rate, "focusing on the regulatory advantages of London versus New York misses the big picture. To abuse once more Thomas Friedman's wonderful analogy, the IPO world is clearly becoming flat."[22] Globalization is much more important to IPO markets worldwide than is the effect of United States securities laws.

In fact, studies of the IPO market show that vigorous disclosure and anti-fraud regulations correlate strongly with an increased number of IPOs, even controlling for other factors using multiple

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[20] *E.g.*, "China's Online Goliaths Prepare Public Offerings in U.S.," N.Y. TIMES DEALBOOK, Mar. 14, 2014 ("The Chinese Internet industry is coming of age, as some of its biggest players prepare to start new chapters as publicly traded companies — in the United States. . . . The latest crop of companies has also chosen to file in the United States, which has enjoyed an abundance of I.P.O.s over the last few years.") (*available at* http://dealbook.nytimes.com/2014/03/14/alibaba-aims-for-an-i-p-o-in-new-york/?_php=true&_type=blogs&_r=0).

[21] Jay R. Ritter, "Investment Banking and Security Issuance," 1A HANDBOOK OF THE ECONOMICS OF FINANCE 293 (George M. Constantinides, *et al.*, eds., Elsevier 2003).

[22] Craig Doidge, *et al.*, *The U.S. Left Behind: The Rise of IPO Activity Around the World*, NBER Working Paper No. w16916, at 32 (March 2011), *available at* http://ssrn.com/abstract=1801086.

regressions.[23] U.S. regulation of financial markets actually enhances this country's competitive position against other markets.

"The United States is often viewed as a gold standard for purposes of accurate and complete disclosure, and foreign markets reward companies that meet these standards. As a result, foreign companies often list in the United States not because they want to raise capital but because of the resulting increase in share prices that comes with increased investor confidence."[24] "Many foreign companies have elected to list on U.S. exchanges in part because of the positive signal conveyed to investors by the issuer's willingness to comply with fuller disclosure requirements and greater protection for minority investors."[25]

Studies have found that foreign companies listing their stocks on their home exchanges and in the United States are able to raise capital on better terms, at a lower net cost than companies that list only outside the United States.[26] Economists refer to

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[23] *Id.* at 20-21.

[24] J. Robert Brown, Jr., Criticizing The Critics: Sarbanes-Oxley And Quack Corporate Governance, 90 MARQ. L. REV. 309, 327 (2006).

[25] Onnig H. Dombalagian, Demythologizing The Stock Exchange: Reconciling Self-Regulation And The National Market System, 39 U. RICH. L. REV. 1069, 1129 (2005).

[26] Craig Doidge, *et al.*, *Has New York Become Less Competitive in Global Markets? Evaluating Foreign Listing Choices Over Time*, at 5, 29 (Fisher Coll. of Bus. Working Paper Series, Paper No. 2007-03-012, July 2007), *available at* http://www.ssrn.com/abstract=982193; Luzi Hail and Christian Leuz, *International Differences in the Cost of Equity Capital:*

this as a "cross-listing premium."[27] One study found "an average 30 percent increase in the home market value of trading after listing on the NYSE."[28]

By contrast, companies that cross-list in their home exchanges and London, which is widely recognized to have less rigorous regulations than the United States, do not enjoy the cross-listing premium.[29] This premium exists in the United States because of the superior protections that the regulatory regime in this country provides investors.[30]

The companies that opposing *amici* fear will flee to London (*see* Chamber of Commerce Br. at 23-24) will more likely list in both countries in order to capture the cross-listing premium from the United States.

The importance of strong securities-law enforcement is also apparent in delisting decisions. An analysis of firms that delisted from American stock markets between 2002 (when the Sarbanes-Oxley Act was enacted) and 2008 validates the theory that firms list in the United States because of

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Do Legal Institutions and Securities Regulation Matter?, 44 J. ACCT. RES. 485, 485 (June 2006).

[27] Doidge, n. 26 *supra*, at 3.

[28] Howell E. Jackson & Eric J. Pan, Regulatory Competition in International Securities Markets: Evidence from Europe, 3 VA. L. & BUS. REV. 207, 230 (2008) (citing Katherine Smith & George Sofianos, The Impact of an NYSE Listing on the Global Trading of Non-U.S. Stocks, 2-3 (New York Stock Exchange, Working Paper No. 97-02, 1997)).

[29] *Id.* at 31.

[30] *Id.* at 29.

the "bonding" effect a U.S. listing confers, strengthening the appeal of their marketed securities, and delist when those benefits become less important (*e.g.*, when there is less need to raise outside capital).[31] When firms needed to demonstrate trustworthiness and integrity to potential outside investors, they tended to list in the United States precisely because of this country's stronger regulations; conversely, the decision to delist usually came when those particular advantages were no longer needed. The study also considered an alternate hypothesis, that firms delisted because of the oversight burdens and deadweight loss imposed by the stronger regulations of the Sarbanes-Oxley Act, but did not find data to support that hypothesis.[32] Contrary to the suppositions of the editorialists cited by opposing *amici*, the increased regulation of U.S. capital markets has not chased firms overseas. Sec. Indus. & Fin. Mkts. Ass'n Br. 13-14. Indeed, evidence supports the inverse conclusion: that regulation strengthens the integrity of the U.S. capital markets, promoting listing here, and the firms that delist are predominantly ones that no longer benefit from the enhanced integrity.[33]

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[31] Craig Doidge, *et al.*, *Why Do Foreign Firms Leave U.S. Equity Markets?*, ECGI - Finance Working Paper No. 244/2009, at 35-36 (May 30, 2009), *available at* http://ssrn.com/abstract=1415782 or http://dx.doi.org/10.2139/ssrn.1415782.

[32] *Id.*

[33] *See* Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 195-96 (2008) ("[T]he United States has simply induced a more cleanly defined separation that allows the oranges and other sweeter

Omnicare's *amici* point to a 2014 "study" that lacks sufficient rigor to be reliable. The Committee on Capital Markets Regulation report (cited in Chamber of Commerce Br. 21-23) marshals a list of percentages comparing the period up to 2007 with the period from 2008 to 2014,[34] but provides no indication as to the source of those numbers and no interpretive data to place them in context. The authors offer no further analysis, no tests for robustness or significance, no regressions to eliminate alternate reasons for the declines shown, and no contextualization within established economic literature. Omnicare's *amici* cite data from "the most recent quarter" (Chamber of Commerce Br. 23), yet the information from the summer of 2014 shows that IPO activity in the U.S. is at its highest level since 2000.[35] In any event, focusing on the short term is likely to be misleading. The longer-term empirical research discussed above shows that strong securities laws strengthen U.S. markets, and the shortcomings in Omnicare's data underscore the wisdom of leaving the matter to Congress.

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fruit to distinguish themselves from the lemons, presumably leading to a greater level of investor protection to the extent that the oranges are now more readily available to domestic investors, and the lemons are not.").

[34] Comm. on Capital Mkts. Reg., Continuing Competitive Weakness in U.S. Capital Markets Data Summary Chart (May 1, 2014), available at http://capmktsreg.org/wp-content/uploads/2014/05/Q1.2014.data_.summary.pdf.

[35] "IPO Docket Suggests Busiest Week Since 2000," WALL ST. J. (July 28, 2014) (*available at* http://blogs.wsj.com/moneybeat/2014/07/28/ipo-docket-suggests-busiest-week-since-2000/).

D. Congress Has Already Accommodated The Concerns Of Underwriters And Auditors.

Certain underwriters and auditors, appearing as *amici* in support of Omnicare, express further concerns regarding their potential Section 11 liability. *See* Sec. Indus. & Fin. Mkts. Ass'n Br. 7-12; Center for Audit Quality Br. 8-20. Their arguments, however, do not support Omnicare's construction of Section 11.

The underwriters' and auditors' concerns are misplaced and have already been accommodated by Congress. Section 11 imposes a different standard of liability on auditors and underwriters than it does on issuers, by creating a "due diligence" defense. In particular, Section 11(b)(3) provides that defendants other than issuers are exempt from liability if they can establish that they "had, after reasonable investigation, reasonable ground to believe and did believe, at the time [the relevant] part of the registration statement became effective, that the statements therein were true." 15 U.S.C. § 77k(b)(3). Auditors enjoy an additional protection, because they are not subject to liability under Section 11 in the first place unless they are named with their consent as having "prepared or certified" part of the registration statement, or a report or valuation used in connection with it, that contains the alleged untrue statement. *Id.* at § 77k(a)(4).

The auditor *amici* acknowledge that "these two provisions both play an important role in addressing potential liability under the Act." Center for Audit Quality Br. 15. Indeed, any complaint by the auditors regarding Section 11 is hard to credit, given

that the common law subjected them to negligence liability for their audit opinions. *See* Restatement (Second) Torts § 552 (1979) (giving multiple examples of auditor liability in the comments and illustrations). Yet both the auditor and underwriter *amici* seek an additional immunity not contained in Section 11 – freedom from liability absent a showing of subjective intent – on the ground that their tasks involve the exercise of judgment.

The short answer to this request is that Congress deliberately made Section 11 strong medicine for auditors and underwriters, and this Court should not expand their immunity beyond that already afforded by the statute. The House Report accompanying the 1933 Act confirmed the "heavy" duty on underwriters and auditors to ensure the accuracy of information in registration statements:

> All who sell securities with such a flaw, who cannot prove that they did not know—or who in the exercise of due care could not have known—of such misstatement or omission, are liable under sections 11 and 12. For those whose moral responsibility to the public is particularly heavy, *there is a correspondingly heavier legal liability*—the persons signing the registration statement, the underwriters, the directors of the issuer, the accountants, engineers, appraisers, and other professionals preparing and giving authority to the prospectus—all these are liable to the buyer . . . if they cannot prove [the use of due care]. This throws upon originators of securities a duty of competence as well as innocence . . . .

H.R. Rep. No. 85, 73d Cong., 1st Sess. at 9 (1933) (emphasis added) (quoted in *Gustafson v. Alloyd Co.*, 513 U.S. 561, 581 (1995)).

Quite plainly, auditors and underwriters are in a better position to investigate the information in a registration statement than are institutional investors. The auditors and underwriters have access to an issuer's internal financial information and its officers. They have the ability to insist on full disclosure as a precondition for supplying their services to the issuer. And they can establish immunity under Section 11 simply by performing their due diligence with reasonable care.

As the SEC has opined, in enacting Section 11,

> Congress recognized that underwriters occupied a unique position that enabled them to discover and compel disclosure of essential facts about the offering. Congress believed that subjecting underwriters to the liability provisions would provide the necessary incentive to ensure their careful investigation of the offering.

The Regulation of Securities Offerings, Securities Act Release No. 7606A, 63 Fed. Reg. 67174, 67230 (Dec. 4, 1998), 1998 WL 833389.

Further, the imprimatur of underwriters and auditors is often critical to an IPO's success, as the SEC explained more than four decades ago:

> By associating himself with a proposed offering, an underwriter impliedly represents that he has made such an investigation in accordance with professional standards. Investors properly rely on this added

> protection which has a direct bearing on their appraisal of the reliability of the representations in the prospectus. The underwriter who does not make a reasonable investigation is derelict in his responsibilities to deal fairly with the investing public.

In re Richmond Corp., Exchange Act Release No. 4584, 41 SEC 398 [1961–1964 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 76,904, 1963 WL 63647, at *7 (Feb. 27, 1963); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 818-19 nn.13-15 (1984) (noting importance of audit opinions to investors).

Because of the vital role played by auditors and underwriters in public offerings of securities, and because the registration process is integral to the statutory scheme, the standard of care imposed by Congress is entirely appropriate. It makes little sense to force an institutional investor to bear the losses caused by the failings of an auditor or underwriter, when the investor does not enjoy the same degree of access to information.

Moreover, the immunity sought by the auditor and underwriter *amici* would sow confusion and generate litigation. The underwriter *amici*, for example, contend that "judgment-laden issues" such as legal compliance, valuation questions, and credit risk demand a showing of subjective intent. Sec. Indus. & Fin. Mkts. Ass'n Br. 10. The auditor *amici*, for their part, suggest that any audit opinion involving an "accounting question," such as the adequacy of loan reserves, an estimate of goodwill, or even a description of credit risks, should require a showing of subjective intent. Center for Audit

Quality Br. 15. "The list is endless." *Id.* at 17. By their own admission, these tasks encompass virtually everything auditors and underwriters do in connection with a public offering.

Such an approach threatens to render Section 11 virtually meaningless for auditors and underwriters. It is difficult to imagine what Congress might have meant by an accountant's certification if not an audit affirming the accuracy of the documents in question, and it is hard to see what Congress meant by an underwriter's representation if not its decision to offer securities for sale under a registration statement filed with the SEC.

When combined with certain holdings in lower courts giving an improperly expansive view to the concept of an "opinion," the proposal by the auditors and underwriters would lead to genuinely absurd results. For example, the Second Circuit has opened the door for an argument that a company's reported assets and its reported earnings may qualify as matters of subjective opinion, because valuation of an asset, such as goodwill, involves judgment, as does the determination of how much a company should reserve for uncollectible loans.[36] Under Generally Accepted Accounting Principles, both determinations directly affect a company's reported financial results; and a failure to write down assets and to take appropriate reserves will overstate reported net income, assets, and earnings per share.[37] Thus, when a company reports its financial

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[36] *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110-13 (2d Cir. 2011).

[37] *See, e.g.*, Larry D. Wall, Timothy W. Koch, *Bank Loan-Loss Accounting: A Review of Theoretical and Empirical*

results, including in its annual report on Form 10-K (which must be included in any registration statements for public offerings of securities), under the Second Circuit's approach the company's reported earnings may be nothing more than a subjective opinion. As if this weren't enough, under the proposal by the auditors and underwriters, the role of an auditor would be simply to form a subjective opinion about whether the company actually holds its professed subjective opinion as to its reported assets and earnings – rather than actually testing the financial results for accuracy.

Such a result would be intolerable. When investors are told that a company earned a specific amount in the past fiscal year, they understand – and are entitled to understand – that the figure disclosed has an objective reality. And they are entitled to think that auditors have tested that objective reality.

This Court should not accept the invitation to water down fundamental protections of the securities laws. The proposals of the auditor and underwriter *amici* should be addressed to Congress, not to this Court.

Evidence, FED. RESERVE BANK OF ATLANTA ECON. REV. 4 (Second Quarter 2000) ("[T]he ultimate effect of an increase in the loan-loss allowance [or reserve] is [] to increase the allowance . . . while decreasing both reported net income and owners' equity."); United States Securities and Exchange Commission, Staff Accounting Bulletin No. 102, 17 C.F.R. Part 211(B) (July 6, 2001) ("Loan loss estimates developed without a disciplined methodology or adequate documentation (of both a disciplined methodology and the resulting amounts of loan loss provisions and allowances) can undermine the credibility of an institution's financial statements.").

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

MAX W. BERGER
BLAIR A. NICHOLAS
SALVATORE J. GRAZIANO
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
T: 212-554-1400
MWB@blbglaw.com
BlairN@blbglaw.com
Salvatore@blbglaw.com

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL LLP
1325 G St., N.W.
Suite 500
Washington, D.C. 20005
T: 202-652-4511
jmassey@masseygail.com

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APPENDIX

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APPENDIX

List of Amici Curiae

Alameda County Employees' Retirement Association is a California public pension plan that provides retirement, death, and disability benefits to active and retired public employees of Alameda County and other participating employers.

APG Asset Management N.V. ("APG") manages pension assets for approximately 4.5 million beneficiaries on behalf of its pension fund clients. APG manages pension assets for twenty percent of all families in the Netherlands.

Arkansas Public Employees Retirement System provides retirement income to state, county and municipal employees, college and university employees, non-teaching public school employees, and other non-state employees in the State of Arkansas.

Arkansas Teacher Retirement System provides retirement, disability, survivor and death benefits to public school teachers and other educationally related employees in the State of Arkansas.

Automotive Industries Pension Trust Fund provides retirement benefits to individuals working as machinists or in related crafts involved in the maintenance and repair of consumer vehicles, commercial transport and industrial transport, primarily in the Northern California area.

Blue Sky Group manages pension assets for approximately 85,000 beneficiaries in the Netherlands on behalf of its pension fund clients.

California Public Employees' Retirement System provides retirement, health and related financial programs and benefits to public employees, retirees and their families and to public employers in the State of California. It is the largest public pension system in the United States.

California State Teachers' Retirement System provides retirement, disability and survivor benefits for full-time and part-time public school educators and their families in the State of California. It is the largest teachers' retirement system and second largest public pension fund in the United States.

Cambridge Retirement System provides retirement, disability, and other benefits to employees of the City of Cambridge, Cambridge Housing Authority, Cambridge Public Health Commission and Cambridge Redevelopment Authority in the Commonwealth of Massachusetts.

Carpenters Pension Trust Fund for Northern California and Carpenters Annuity Trust Fund for Northern California provide retirement benefits to members of the United Brotherhood of Carpenters and Joiners of America within forty-six northern California counties.

City of Dania Beach Police & Firefighters' Retirement System provides retirement and other benefits for police officers, firefighters, and their beneficiaries in the City of Dania Beach, Florida.

Colorado Public Employees' Retirement Association provides retirement and other benefits to the employees of government agencies and public entities in the State of Colorado.

Dallas Police and Fire Pension System provides retirement, death, and disability benefits for police officers, firefighters, pensioners, and their beneficiaries in the City of Dallas, Texas.

Employees Retirement System of the City of St. Louis is a governmental plan that provides retirement, death, and disability benefits to employees of: the City of St. Louis, Missouri, the St. Louis Art Museum, the St. Louis Zoo, the St. Louis Public Library, the Metropolitan Taxicab Commission, the Mental Health Board and Tower Grove Park.

Fire & Police Pension Association of Colorado administers a statewide multiple employer public employee retirement system providing defined benefit plan coverage as well as death and disability coverage for police officers and firefighters throughout the State of Colorado.

Florida's State Board of Administration is responsible for investing the assets of the Florida Retirement System Trust Fund, one of the largest public retirement plans in the United States, as well as the assets of a variety of other state funds.

Government of Guam Retirement Fund provides retirement, health, disability, and other benefits to employees and their beneficiaries of the Government of Guam.

Illinois Municipal Retirement Fund provides retirement, disability, and death benefits to employees of local governments and school districts in the State of Illinois.

Jacksonville Police and Fire Pension Fund is a defined benefit pension plan covering all full-time

police officers and firefighters of the Consolidated City of Jacksonville, Florida.

Kern County Employees' Retirement Association provides retirement, disability and death benefits to employees of Kern County, California.

Louisiana Sheriffs' Pension & Relief Fund is a multi-employer, defined benefit, governmental retirement plan providing retirement, disability and death benefits to active and retired employees of the sheriff's offices in all sixty-four Louisiana parishes.

Miami Police Relief and Pension Fund is a defined contribution plan providing retirement benefits to police officers in the City of Miami, Florida.

Mn Services N.V. manages and administers pension assets for approximately two million people in the Netherlands and United Kingdom on behalf of its pension fund clients.

Montana Board of Investments is responsible for investing all state agency funds and local government funds under a unified investment program for the State of Montana.

Municipal Employees' Retirement System of Michigan is a statutory public corporation with nearly eight hundred municipal members that was created by the Michigan Legislature to help municipalities across the State of Michigan offer affordable, sustainable retirement solutions for their employees.

The New York State Common Retirement Fund ("NYSCRF") provides service and disability retirement benefits, as well as death benefits to state and local government employees and employees of

certain other participating employers in the State of New York. As one of the largest public pension funds in the United States, NYSCRF has more than one million members, beneficiaries, and retirees.

New York State Teachers' Retirement System ("NYSTRS") administers a defined benefit plan that provides retirement, disability and death benefits to New York State public school teachers and administrators (outside of New York City). It is the second largest public retirement system in New York State and one of the ten largest public pension funds in the nation.

Operating Engineers Pension Trust provides retirement benefits to public and private construction workers and their survivors, including heavy equipment operators, mechanics, concrete pumpers, soil testers, inspectors, and surveyors.

PGGM Investments manages pension assets for approximately 2.5 million beneficiaries in the Netherlands on behalf of its pension fund clients.

The Regents of the University of California ("the University") manages a portfolio of investments which provides benefits to current and retired employees and their beneficiaries. In addition, the University has a separate investment portfolio, its General Endowment Pool (est. 1933), which consists of over 5,000 individual endowed gift funds which support the University's mission of education, research and public service.

Rockledge Firefighters', Rockledge General Employees' & Rockledge Police Officers' Retirement Plans manage the retirement plans for fire

department, police department, and general employees of the City of Rockledge, Florida.

Royal Mail Pension Plan provides pension benefits to employees of Royal Mail, the United Kingdom's universal postal service. It is one of the United Kingdom's largest pension systems.

Sacramento County Employees' Retirement System provides retirement, disability, and survivors' benefits to employees of the County of Sacramento, California, the Superior Court of the County of Sacramento, and eleven special districts with the County of Sacramento.

San Diego City Employees' Retirement System administers the defined benefit plans for active and retired employees of the City of San Diego, San Diego Unified Port District and San Diego County Regional Airport Authority, in California.

San Mateo County Employees' Retirement Association is responsible for providing retirement, disability and survivor benefits to employees and elected officials of the County of San Mateo, the Superior Court of the County of San Mateo, and the San Mateo County Mosquito and Vector Control District in California.

Santa Barbara County Employees' Retirement System is responsible for providing retirement, disability, death and survivor benefits for employees and contracting districts of the County of Santa Barbara, California.

State of Wisconsin Investment Board is responsible for managing the assets of the Wisconsin Retirement System, the State Investment Fund (SIF) and other trust funds of the State of Wisconsin.

Tulare County Employees' Retirement Association provides retirement, disability and death benefits to employees of the County of Tulare, California, the Tulare County Superior Court, and the Strathmore Public Utility District.

Utah Retirement Systems provide retirement and insurance benefits to Utah public employees.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
AUG 28 2014
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No. 13-435

IN THE
Supreme Court of the United States

OMNICARE, INC., *et al.*,
Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

BRIEF OF OCCUPY THE SEC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

AKSHAT TEWARY
Counsel for Amicus Curiae
1974 State Route 27
Edison, NJ 08817
(732) 287-0080
info@tewary.com

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STATEMENT OF INTEREST

Occupy the SEC ("OSEC") submits this brief in support of Respondents and the holding of the Sixth Circuit in the case below, *Ind. Dist. Council of Laborers v. Omnicare, Inc.*, 719 F.3d 498 (6th Cir. 2013).[1] OSEC is an advocacy group within the New York-based Occupy Wall Street movement. OSEC's mission is to advocate for specific improvements to legislations and regulations governing the financial services industry. We seek to ensure that the nation's laws serve the public interest, and not that of Wall Street and its lobbyists. Our group has previously filed *amicus curiae* briefs in court cases that raise significant issues of concern for financial activists, including the recent Supreme Court cases *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) and *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

The instant case centers on a key provision of the Securities Act of 1933 ("'33 Act"), Section 11, 15 U.S.C. § 77k, which creates an express right of action against issuers and their agents for material misrepresentations contained in the offering materials of registered securities. Shoddy mortgage-backed securities played a pernicious role in the recent financial crisis, which destabilized the capital markets, soured the global economy and jeopardized the financial position of the average person. In the run-up to the crisis, the regis-

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[1] The parties have consented to the filing of this brief. Blanket letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court by Petitioners and Respondents. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its members made a monetary contribution to the preparation or submission of this brief.

tration statements of many toxic securities falsely touted these instruments' credit-worthiness, to the financial detriment of investors. Unfortunately, enforcement agencies such as the Securities and Exchange Commission ("SEC") have been of limited effectiveness in adequately addressing these wrongs. Section 11 is an important tool that aggrieved investors can use to seek remedy for misleading statements made by issuers and their agents.

OSEC files this amicus to advocate for the interests of misled investors, like the Respondents in this case, whose access to justice will be severely limited if the Court adopts the Petitioners' position. Our governmental system must protect our rights,[2] and we ask the Court to serve the best interests of the people by interpreting the '33 Act in a way that safeguards the right of victims of financial chicanery to seek redress through the courts, free of undue procedural burdens like the subjective falsity requirement under consideration here.

SUMMARY OF ARGUMENT

The Court should affirm the Sixth Circuit by holding that a Section 11 plaintiff is not required to allege that the speaker of a materially misleading statement of opinion actually held a different opinion than the one expressed ("subjective falsity").

Both Supreme Court precedent and the legislative history of the '33 Act support the view that a Section

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[2] *See* Occupy Wall Street, Declaration of the Occupation of New York City (2011), *available at* http://www.nycga.net/resources/declaration/.

11 plaintiff need only allege a material misrepresentation in order to establish a prime facie claim. Once the plaintiff has made such a prima facie showing -- a showing that need not ensnare itself in the thickets of the defendant's subjective knowledge -- the burden shifts to the defendant to disprove liability.

The Petitioners evince a basic misconstrual of what constitutes a statement of opinion. In their view, the only way a statement of opinion can be false is if the speaker did not truly believe the opinion. Pet. Br. 2. This myopic view fails to perceive that statements of opinion, which are inferences based on underlying facts, can prove to be objectively false. The Supreme Court, in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983), has previously held that objective falsity is the only required falsity element under Section 11, a strict liability statute.

The Petitioners rely heavily on *Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991) even though that decision is inapposite to the case at bar. *Virginia Bankshares* addressed a provision of an entirely separate statute, Section 14(a) of the Securities Exchange Act of 1934 ("'34 Act"), 15 U.S.C. § 78n(a). Section 14(a) seeks to protect sophisticated shareholders, whereas Section 11 safeguards lay investors. Thus, the standard of liability applicable to Section 14(a) is less rigorous than the strict liability required under Section 11 of the '33 Act. It would therefore be erroneous to apply *Virginia Bankshares* to the present matter. In any case, a strong argument can be made that *Virginia Bankshares* did not conclude what the Petitioners claim it did. The Court in that case focused on objective falsity and did not explicitly hold that subjective falsity

was a required element of a Section 14(a) claim. *Virginia Bankshares*, 501 U.S. at 1096.

The legislative history of the '33 Act manifests that Congress never intended for the defendant's state of knowledge to play any role whatsoever in a Section 11 plaintiff's prima facie showing. Indeed, learned members of the bar shared the same understanding of the Act shortly after its promulgation.

The Petitioners advocate an extreme view that would place an almost insurmountable burden on plaintiffs. It is axiomatic that Section 11 has no scienter element. *Herman*, 459 U.S. at 382. Yet, the proposed subjective falsity standard is either practically equivalent to or more burdensome than the scienter element typically required in Section 10(b) claims under the '34 Act.

Numerous policy considerations also weigh in favor of affirmation of the Sixth Circuit's decision. The recent financial crisis was caused in large part by the proliferation of toxic mortgage-backed securities. The offering materials of many of these registered securities were replete with misrepresentations, as evidenced by the large number of lawsuits successfully alleging Section 11 violations. Under the overbroad interpretation championed by the Petitioners, Section 11 would no longer remain a viable means of redress for aggrieved investors. Such an outcome would frustrate the public interest.

ARGUMENT

The statutory provision at issue in this case, Section 11 of the Securities Act of 1933 ("'33 Act"), imposes civil liability where any part of the registration statement of a securities offering "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). The task before the Court is to determine whether a Section 11 plaintiff must plead that the speaker of an offending statement of opinion actually knew of the falsity of the statement ("subjective falsity"). The Petitioners claim that such a pleading is necessary, Pet. Br. 13, while the Defendants contend that it is not. Opp. Cert. 18-19. The United States, as amicus curiae, proffers a third approach, whereunder Section 11 liability attaches for statements of opinion that either falsely held or unreasonably held. U.S. Am. Br. 5, 9.

I. THE PETITIONERS' ARGUMENT IS PREMISED ON AN INCOMPLETE DEPICTION OF WHAT CONSTITUTES AN OPINION

The Petitioners argue that "a statement of opinion or belief is an 'untrue statement of a material fact' **only** if it misstates the 'fact' that the speaker actually held the stated belief." Pet. Br. 2 (emphasis added). In so arguing, they exhibit a basic misunderstanding of what is an opinion and what is a fact. Critically, Petitioners

ignore the fact that statements of opinion can become objectively true or untrue after the passage of time.

"Opinions" have been long understood in legal tradition to be inferences based on underlying facts.[3] For instance, assume that a representative of an issuer proclaims that the offering price of a particular security presents "high value for the shares." The actual belief and mindset of the speaker in making that statement relates to the separate issue of fraudulent intent, or scienter.[4] The speaker's statement can become objectively true or untrue with the passage of time, regardless of the knowledge of the speaker. Thus in our example, time will reveal whether the price represents "high value" or not. Eventually, the stock will prove to be highly or lowly valued, irrespective of the speaker's original mindset in making the statement. This focus on objective truth versus untruth (i.e., "objective falsity") is at the heart of Section 11.

II. UNDER PRIOR SUPREME COURT PRECEDENT, SUBJECTIVE FALSITY IS NOT A REQUIRED ELEMENT OF A PRIMA FACIE SECTION 11 CLAIM

Prior Supreme Court precedent mandates that the Sixth Circuit's decision be affirmed.

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[3] *See* Black's Law Dictionary 1093 (6th ed. 1990) (defining "opinion evidence" as "[e]vidence of what the witness thinks, believes or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves.").

[4] Even Petitioners admit that Section 11 does not require a scienter showing. Pet. Br. 28.

A. In *Herman*, This Court Precluded the Possibility of a Subjective Falsity Requirement Under Section 11

The issue before the Court has already been squarely and forcefully addressed in the case of *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).[5] The Court's decision here should begin and end with a review of *Herman* and that case's posture towards Section 11's pleading requirements.

According to *Herman*, the knowledge or mindset of a defendant is not a relevant inquiry for Section 11 purposes. *See id.* Rather, the only requirement for a prima facie case is showing that the defendant made a material misstatement or omission in a registration statement. *Id.* The *Herman* court recognized that Section 11 was "designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability." *Id.* For example, for issuers, Section 11 liability is "virtually absolute, even for innocent misstatements." *Id.* This recognition is a clear repudiation of the subjective falsity theory propounded by the Plaintiffs. After all, if even innocent misstatements are actionable, the issuer's knowledge and intent can have no bearing on the establishment of a prima facie case.

Underwriters and other agents of an issuer are presumptively liable upon a prima facie showing of a material misrepresentation, but may be able to avail of a "due diligence" affirmative defense depending on the circumstances. *Id.* (citing 15 U.S.C. § 77k(b)). How-

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[5] *Herman* was a unanimous decision of eight justices, with one non-voting Justice.

ever, even for these individuals, the due diligence exemption only serves as a possible affirmative defense, and does not change the equation for what constitutes a sufficient Section 11 pleading.

Herman is the one and only case in which the Supreme Court has directly addressed the mindset required for a Plaintiff's pleading under Section 11, and this Court need look no further for resolution of the instant matter.

B. *Virginia Bankshares* Does Not Mandate the Pleading of Subjective Falsity in Section 11 Cases

Petitioners and both the Second[6] and Ninth Circuits[7] have cited *Virginia Bankshares*, 501 U.S. at 1095-96 in support of the untenable claim that subjective falsity must be pleaded in Section 11 cases involving a statement of opinion. In actuality, *Virginia Bankshares* did not directly address whether subjective falsity was a required element, and moreover related to a provision of an entirely separate statute, Securities Exchange Act of 1934 ("'34 Act"), Section 14(a), 15 U.S.C. § 78n(a), and its implementing regulation, 17 C.F.R. § 240.14a-9(a).

Virginia Bankshares held that objective falsity is a required element of a misrepresentation claim under Section 14(a) of the '34 Act. 501 U.S. at 1096 ("We therefore hold disbelief or undisclosed motivation,

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[6] *Fait v. Regions Financial Corp.*, 655 F.3d 105, 110 (2d Cir. 2011).

[7] *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009).

standing alone, insufficient to satisfy the element of fact that must be established under § 14(a).") The case raised the issue of subjective falsity in dicta, accepting the prior jury finding that subjective falsity existed in that case. *Id.* at 1090. However, the majority opinion had no discussion of whether subjective falsity is actually a **necessary** element of 14(a) claim. In other words, the Court never decided on whether objective falsity, standing alone, is sufficient for liability.

Thus, *Virginia Bankshares* is uninstructive to the case at bar, because it fails to address whether subjective falsity is a necessary component of a Section 11 pleading. As argued above, the *Herman* case fills that lacuna quite snugly, having recognized that objective falsity and materiality are the only requirements for a prima facie Section 11 claim, even in cases of "innocent" misstatement. *Herman*, 459 U.S. at 382.

Even if the Court interprets *Virginia Bankshares* as explicitly requiring both subjective falsity and objective falsity, it bears emphasis that the case dealt with the limited purview of Section 14(a) of the '34 Act, and not Section 11 of the '33 Act. Not all parts of the federal securities laws seek to address the same problems or achieve the same objectives. Thus, it can be erroneous for the Court to conflate a decision affecting one statutory provision with another. Simply put, applying *Virginia Bankshares* to the Section 11 context would be like comparing apples to oranges. Section 14(a) of the '34 Act deals with proxy solicitations to often-times sophisticated shareholders who are continuing participants in a corporation. *Shidler v. All American Life & Financial Corp.*, 775 F.2d 917, 927 (8th Cir. 1985). In sharp contrast, Section 11 of the '33 Act deals with registration statements open to members of

the general public, virtually all whom are relatively unsophisticated or uninformed about an issuing corporation' inner dealings. *Id.* ("The investors protected by the mechanism of disclosure under section 11 cannot be expected to be well-informed about the corporation's activities when they make their initial investments."). It may be appropriate to place the hurdle of subjective falsity before relatively sophisticated Section 14(a) claimants. However, applying subjective falsity to Section 11 would serve as an unnecessary roadblock for meritorious claims, and would hinder the lay public's ability to seek redress for misleading registration statements. Such a result would run counter to Section 11's broadly remedial objective. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963) (recognizing that the securities laws should be interpreted "not technically and restrictively, but flexibly to effectuate [their] remedial purposes.").

Another distinguishing factor of *Virginia Bankshares* is that Section 14(a) of the '34 Act applies an entirely different standard of liability than Section 11 of the '33 Act. As explained above, Section 11 involves a strict standard of liability. *See Herman*, 459 U.S. at 382; *see also Shidler*, 775 F.2d at 927 ("Little less than a strict liability standard is capable of affording these new investors the necessary protection."). In sharp contrast, numerous circuit courts concur that strict liability is not the correct standard of liability applicable to Section 14(a) and its corresponding regulation, SEC Rule 14a-9. *See, e.g., Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428 (6th Cir. 1980); *Gould v. American Hawaiian S.S. Co.*, 535 F.2d 761, 776-77 (3d Cir. 1976); *Gruss v. Curtis Publishing Co.*, 534 F.2d 1396, 1403 (2d Cir. 1976). Thus, subjective falsity may

be viewed as a necessary element for Section 14(a), but not so for Section 11, which countenances no subjective element.

III. CONGRESS NEVER INTENDED FOR SUBJECTIVE FALSITY TO SERVE AS A PLEADING ELEMENT UNDER SECTION 11

A plain reading of Section 11 evinces no mention whatsoever of the knowledge or mindset of the defendant. *See* 15 U.S.C. § 77k(a). If Congress intended to predicate liability under Section 11 on a showing of subjective falsity, it could have inscribed such a provision into the statute. The absence of such a provision is telling. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

The absence of a subjective falsity requirement in the statute was not an oversight. A review of Congressional records reveals that the legislative intent behind Section 11 was to allow a plaintiff to plead a prima facie case without having to delve into the knowledge or mindset of the defendant. A House Committee Report issued on May 4, 1933 in connection with the bill that became the Securities Act stated the following in connection with Section 11:

> Every lawyer knows that with all the facts in the control of the defendant it is

> practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of defendant. Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance. The responsibility imposed is no more nor less than that of a trust. . . . **To impose a lesser responsibility would nullify the purposes of this legislation.**

H.R. Rep. No. 73-85, 73d Cong., 1st Sess. 9-10 (1933) (emphases added).

Congress explicitly rejected the notion that plaintiffs should be required to plead to a defendant's state of knowledge in a Section 11 claim. *Id.* The House recognized the difficulty that plaintiffs would face in having to plumb the depths of a defendant's psyche to reveal culpable knowledge. *Id.* Such knowledge is likely obfuscated by layers of corporate hierarchies, which have only proliferated in the near-century since the passage of the '33 Act.

Instead, Congress intended that a Section 11 plaintiff need only plead a material misrepresentation (or omission) in order to establish a prima facie claim. At that point, the burden would then be placed upon the defendant to "disprov[e] responsibility for reprehensible acts." *Id.* The Petitioners in this case seek to rewrite Congress' allocation of burdens by asking putative Section 11 plaintiffs to plead subjective falsity, in direct contravention of legislative intent. The Court

must not permit the Petitioners to achieve that end. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Indeed, the "subjective falsity" requirement espoused by Petitioners and the Second and Ninth Circuits is a relative novelty. Soon after the passage of the '33 Act, learned members of the bar acknowledged that subjective knowledge is irrelevant for purposes of a prima facie Section 11 claim. For instance, in December 1933, William O. Douglas (an early Chairman of the SEC and a future Supreme Court Justice) co-authored an article in the Yale Law Journal in which he summarized the key provisions of the '33 Act, noting that under Section 11, "[n]either the plaintiff **nor anyone else** need have known of [the untruth or omission.]" William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 176 (1933) (emphasis added).[8] The Court should not permit the Petitioners to upend this long-settled understanding.

The United States, as amicus curiae, argues that courts should impose liability under Section 11 where a statement of opinion is either falsely or unreasonably held. U.S. Am. Br. 5, 9. However, this approach, like that championed by the Petitioners, has been explicitly rejected by Congress. As noted above, the House Report on the eventual '33 Act endorsed an approach

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[8] The Supreme Court has utilized this article as a guidepost to understanding the '33 Act on five prior occasions. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 601 (1995).

to Section 11 that focused solely on objective falsity, given that in registered offering "it is practically impossible for a buyer to **prove a state of knowledge or a failure to exercise due care** on the part of defendant." H.R. Rep. No. 73-85, 73d Cong., 1st Sess. 9 (1933) (emphasis added). Thus, both prongs of the United States' view (subjectively falsity and a reasonableness standard) were considered and rejected by Congress before it passed Section 11 into law.

IV. A SUBJECTIVE FALSITY REQUIREMENT IN SECTION 11 WOULD BE AT ODDS WITH FIRMLY ESTABLISHED PRECEDENT ON SCIENTER

No circuit court has ever held that a prima facie Section 11 case requires a showing of scienter.[9] However,

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[9] *See, e.g., Silverstrand Invs. v. AMAG Pharms., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013) ("[U]nlike § 10(b) of the Securities and Exchange Act, § 11 does not have a scienter or reliance requirement...."); *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 484 (2d Cir. 2011) (holding that a Section 11 plaintiff "need [not] plead scienter, reliance, or loss causation."); *In Re Constar International Securities Litigation*, 585 F.3d 774, 782 (3rd Cir. 2009) ("A prima facie case under § 11 is straightforward, requiring only a showing of a material misrepresentation or omission from a defendant's registration statement."); *Cozzarelli v. Inspire Pharmaceuticals Inc.*, 549 F.3d 618, 628 (4th Cir. 2008) (noting that for Section 11 "proof of scienter is not required."); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495 (5th Cir. 2005) ("Section 11's liability provisions are expansive creating virtually absolute liability for corporate issuers for even innocent material misstatements...."); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 495 (7th Cir. 1986) (observing that that Section 11 imposes "liability without fault"); *Carlon v. Thaman (In re NationsMart Corp. Sec. Litig.)*,

the Petitioners' theory, if accepted, could change this well-settled precedent. Black's Law Dictionary defines scienter as "knowingly" and "knowledge...with an intent to deceive." Black's Law Dictionary 1345 (6th ed. 1990). This definition is virtually indistinguishable from the standard of subjective falsity espoused by the Petitioner. If a speaker states an opinion that materially misrepresents some underlying fact, with knowledge that the underlying fact is untrue, that mental state logically correlates to an intent to deceive. The claimed distinction between these mental states is too nice to be practicable in the real world.

In fact, the proposed subjective falsity standard could render Section 11 – a strict liability provision – even more difficult to plead than traditional fraud-based claims, like § 10(b) of the '34 Act, 15 U.S.C. § 78j(b), that have an explicit scienter requirement. Every Court of Appeals that has considered the issue has held that a plaintiff can meet the scienter requirement in securities law cases by showing that the defendant acted recklessly. *Tellabs, Inc. v. Makor Issues &*

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130 F.3d 309, 315 (8th Cir. 1997) ("To establish a prima facie § 11 claim, a plaintiff need show only that he bought the security and that there was a material misstatement or omission. Scienter is not required for establishing liability under this section."); *Hildes v. Arthur Andersen LLP*, 734 F.3d 854, 860 (9th Cir. 2013) ("This court, among several, has also noted that Section 11 lacks a scienter requirement."); *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1251 (10th Cir. 1997) (recognizing that a Section 11 plaintiff need only show a material misstatement or omission to establish a prima facie case); *APA Excelsior III LP v. Premiere Technologies*, 476 F.3d 1261, 1271 (11th Cir. 2007) (observing that Section 11 liability will attach even for "innocent misstatements."); *Wachovia Bank & Trust Co. v. Nat. Student Marketing Corp.*, 650 F.2d 342, 356 (D.C. Cir. 1980) ("Under [Section 11], a defendant may be held liable even for negligent misstatements.").

Rights, Ltd., 551 U.S. 308, 319 n.3 (2007). *In Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. ___, 131 S. Ct. 1309, 1324-25 (2011), the Court declined to define scienter for securities law purposes, but also declined to overturn the lower court's conclusion that the scienter requirement can be met by showing "deliberate recklessness." *Id.*

Proving that a Section 11 defendant actually knew about the falsity of a stated opinion is a much more difficult task than merely demonstrating objective recklessness. Indeed, in enacting Section 11, Congress explicitly acknowledged that proving a defendant's culpable state of knowledge can be "practically impossible." H.R. Rep. No. 73-85, 73d Cong., 1st Sess. 9 (1933). A subjective falsity requirement would effectively neuter Section 11 as a viable option for duped investors, as it would render that claim even more burdensome than a standard Section 10(b) fraud claim. This reversal is contrary to the very purpose behind these statutory provisions. Section 11 is intended to "place[] a relatively minimal burden on a plaintiff" in comparison to Section 10(b). *Herman*, 459 U.S. at 382.

Petitioners advocate for an extreme deviation from the basic purpose of Section 11, a cause of action that for many decades has been understood to be a strict liability provision devoid of any pleading requirement relating to the defendant's state of mind.

V. PUBLIC POLICY CONSIDERATIONS MILITATE AGAINST THE PETITIONERS' PROPOSED SUBJECTIVE FALSITY REQUIREMENT UNDER SECTION 11

Civil liability provisions like 15 U.S.C. § 77k(b) serve a vital function in promoting fair and equitable conduct in the marketplace. The subjective falsity standard promoted by Petitioners, if adopted, would severely inhibit aggrieved investors from seeking redress for material misrepresentations contained in offering documents. Section 11 was intended to apply an exacting standard of liability that vigorously protects investors in registered securities, and the proposed subjective falsity requirement flies in the fact of that intent.

If the Court endorses the Petitioners' position, a deleterious signal will be sent to the public: that a malefactor can expect to escape Section 11 liability, despite the utterance of material misrepresentations that hurt investors, so long as that malefactor is ignorant about the truth of her statements. The mere absence of subjective falsity in such a scenario should not absolve an issuer or its agent of liability under Section 11.

The Petitioners' view creates perverse incentives that are anathema to fairly functioning capital markets. If adopted, the subjective falsity standard would incentivize issuers and their agents to avoid conducting proper due diligence to apprise themselves about the facts surrounding an offered stock. After all, would-be plaintiffs would not be able to sue under the Petitioners' vision of Section 11 if a defendant opining on behalf

of the issuer lacked a factual basis to support that opinion.

Issuers would be encouraged to have ignorant employees state outlandish (though firmly held) opinions on registered offerings, comforted by the fact that the speaker would eschew liability even if those opinions turned out to be wildly untenable. Figureheads and neophytes could be recruited to sign off on registration statements, and prospective investors suffering losses because of misrepresented opinions would be left out in the cold.

The area of financial malfeasance is of particular concern to OSEC given the catastrophic impact that excesses on Wall Street have had on the global economy in the last few years. Both investors and the public at large have a compelling interest in the reduction of material misrepresentations made in connection with registered securities.

The recent financial crisis is testament to the dire need for aggressive civil liability provisions under the securities laws. While recessions are cyclical in nature, securities misconduct played a significant role in propelling the onset and exacerbating the severity of the recent financial crisis. The government has recognized the causative role that toxic mortgage-backed securities played in the 2008 financial crisis, which devastated the economic position of multinational conglomerates and poor individuals alike. *See* The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xviii (2011). In the run-up to the crisis, securitized offerings flourished in an environment of collapsing lending standards and lax regulation. The Financial Crisis Inquiry Com-

mission ("FCIC"), which was charged with investigating the causes behind the recession, observed that:

> major financial institutions ineffectively sampled loans they were purchasing to package and sell to investors. They knew a significant percentage of the sampled loans did not meet their own underwriting standards or those of the originators. Nonetheless, they sold those securities to investors. The Commission's review of many prospectuses provided to investors found that this critical information was not disclosed.
> *Id.* at xxii.

Further, the FCIC estimated that the total economic loss attributable to mortgage malfeasance between 2005 and 2007 was $112 billion. *Id.* During this time, the SEC proved to be eminently ineffective in uncovering dangers hidden in registered offering materials. "'The elephant in the room is that we didn't review the prospectus supplements,' the SEC's deputy director for disclosure in corporation finance, Shelley Parratt, told the FCIC." *Id.* at 169.

Private actions under Section 11 have the capacity to step up where the SEC has failed, by serving as a secondary source of market enforcement. Indeed, the dockets of numerous federal courts bear witness to the fact that Section 11 has been used with some success against purveyors of falsely touted securities. *See, e.g.*, Brian Mahoney, *Goldman Sachs in Talks to Settle FHFA Suit Over MBS Losses*, Law360, July 28, 2014, http://www.law360.com/articles/561418/goldman-sachs-

in-talks-to-settle-fhfa-suit-over-mbs-losses. The Court must ensure the continued vitality of Section 11. Issuers and agents faced with the possibility of strict liability under that statute would remain circumspect about misleading investors through offering materials. In contrast, the interposition of a subjective falsity requirement would severely undermine Section 11's capacity to serve as a viable tool in the aggrieved investor's tool-belt.

The Great Recession of 2008, borne largely of acquisitive speculation, mismanagement, and malfeasance at financial institutions, extinguished nearly 40% of family wealth from 2007 to 2010. Jesse Bricker, *et al.*, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances* 17, Federal Reserve Bulletin (June 2012). The inflation-adjusted median household net worth actually regressed back to 1992 levels. *Id.* Strong civil liability provisions like Section 11 are necessary to help the nation avoid similarly gargantuan public losses in the future.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to rule in favor of the Respondents and hold that that a Section 11 plaintiff is not required to allege subjective falsity.

August 28, 2014

Respectfully submitted,

AKSHAT TEWARY
Counsel for Amicus Curiae
1974 State Route 27
Edison, NJ 08817
(732) 287-0080
info@tewary.com

AMICUS CURIAE BRIEF

No. 13-435

In The Supreme Court of the United States

OMNICARE, INC., ET AL.,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PROFESSORS AT LAW AND BUSINESS SCHOOLS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

J. ROBERT BROWN, JR.
Counsel of Record
Professor of Law
Director
Corporate-Commercial Law Program
UNIVERSITY OF DENVER STURM COLLEGE OF LAW
2255 E. Evans Ave.
Denver, CO 80208
(720) 933-5292
jbrown@law.du.edu

CELIA TAYLOR
Professor of Law
UNIVERSITY OF DENVER STURM COLLEGE OF LAW
Denver, CO 80208

LYMAN JOHNSON
Robert O. Bentley Professor of Law
WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW
Lexington, VA 24450
and Professor of Law
ST. THOMAS SCHOOL OF LAW
Minneapolis, MN 55403

JOAN MACLEOD HEMINWAY
W.P. Toms Distinguished Professor of Law
THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW
Knoxville, TN 37909

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether, for purposes of issuer liability under Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, a statement in a registration statement attempting to characterize a verifiable, present fact about the legal validity of contracts as a "belief" rather than a fact can shield an issuer from liability.

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars at American law and business schools whose research and teaching focus on federal securities regulation and the governance of public corporations. Two of the four authors appearing as counsel on this brief have together submitted to this Court briefs on prior occasions as *amici* in cases arising under the federal securities laws on behalf of law and business faculty.[2] *Amici* have an interest in ensuring a proper interpretation of the statutory framework put in place by Congress under Section 11 of the Securities Act of 1933. *See* 15 U.S.C. §77k. *Amici* have no financial stake in the outcome of this litigation.

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici* and their academic institutions contributed monetarily to the preparation or submission of this brief. None of the schools that employ *amici* are a signatory to this brief, and the views expressed here are not affiliated with those institutions. This *amicus* brief is filed pursuant to the blanket consent executed by both parties and filed with this Court (by Respondents and Petitioners on March 28, 2014).

[2] Two of the four authors on this brief also submitted *amicus* briefs on behalf of law and business faculty in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010) and in *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011). *See* Br. of *Amici Curiae* Faculty at Law and Business Schools in Support of Resp'ts, *Merck & Co., Inc. v. Reynolds*, No. 08-905, Oct. 26, 2009; Br. for Professors at Law and Business Schools as *Amicus Curiae* in Support of Resp'ts, *Matrixx Initiatives, Inc. v. Siracusano*, No. 09-1156, Nov. 12, 2010.

SUMMARY OF ARGUMENT

This is a garden-variety action alleging false disclosure that requires nothing more than application of settled principles under the federal securities laws. The statement at issue is one of present material fact, not opinion. Falsity is established, as Respondents have alleged, through evidence showing that the statement at issue was incorrect on the date made.

Respondents seek to recover under Section 11 of the Securities Act of 1933, 15 U.S.C. §77k ("1933 Act"), for alleged misstatements of material fact made by Petitioners. The provision makes actionable a misstatement or omission of a material fact in an effective registration statement. 15 U.S.C. §77k(a). To establish a *prima facie* case, a purchaser of the securities subject to the registration statement "need only show a material misstatement or omission. . . ." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

Respondents have met this standard. Petitioners represented in the registration statement that "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve." Second Am. Complaint ("Complaint") ¶46. The Complaint asserts that the statement was materially false and misleading "when made." *Id.* at ¶47. The Complaint includes a number of allegations, which, when taken as true,

demonstrate that the contracts were not legally valid at the time of the statement. *See id.* at ¶47-90. The Sixth Circuit found these allegations sufficient to demonstrate falsity. *See Ind. State Dist. Council v. Omnicare, Inc.*, 719 F.3d 498, 505-07 (6th Cir. 2013), *cert. granted*, 134 S. Ct. 1490 (2014).

Petitioners, however, contend that the statement should be characterized as an "opinion." Relying on *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), they assert that the falsity of an opinion can only be shown through evidence of subjective disbelief. We disagree with this characterization of the statement at issue as an opinion. A representation about the legal validity of contracts, like other matters of present fact, can be false on the date made. To the extent, for example, that contracts are conduits for illegal kickbacks, it will not always be necessary for an issuer to obtain a court ruling or await future developments to know that the contracts are invalid.

A speaker may, in some cases, express an opinion or belief with respect to present facts. An opinion in these circumstances conveys uncertainty or doubt as to the accuracy of the representation. Where, however, the speaker possesses information establishing the plain invalidity of the stated facts, the requisite uncertainty does not exist. Nor does the issuer create uncertainty by adding the words "[w]e believe" to the statement.

Allowing an issuer to escape liability for untrue statements of present fact in a registration statement

by treating them as beliefs or opinions contradicts the statutory framework set out in, and policies underlying, Section 11. *See* 15 U.S.C. §77k. Under the provision, issuers are assigned unique responsibility for ensuring the accuracy of a registration statement. Insiders and underwriters are permitted to avoid liability for a false representation where they "believe" that the facts in the registration statement are accurate. *See* 15 U.S.C. §77k(b)(3) (providing that insiders and underwriters can avoid liability where, "after reasonable investigation," they had "reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading").

Issuers, in contrast, are held to a standard of liability that is "virtually absolute. . . ." *Herman & MacLean*, 459 U.S. at 382. They are specifically denied the right to raise as a defense to a Section 11 claim alleging a misrepresentation or omission of material fact that they "believe" otherwise. *See* 15 U.S.C. §77k(b) (due diligence defense applicable to those "other than the issuer"). Issuers, therefore, have additional incentive to verify the accuracy of the registration statement.

Permitting a statement about the validity of contracts to be treated as a belief or opinion when the issuer possesses information to the contrary fundamentally alters this regulatory scheme. If such

treatment is judicially validated, issuers will be able to rely on a litigation strategy that Congress sought to foreclose in denying issuers the right to resort to a reasonable belief defense under Section 11. Moreover, the approach effectively introduces into Section 11 a state of mind requirement. Purchasers required to establish a subjective disbelief as to present facts will be obligated to present evidence similar to that needed to demonstrate scienter.

To the extent, however, that this Court treats the statements at issue as opinions, we do not agree that the matter is "answered" by the decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991). *See* Pet'r's Br. at 2. In *Virginia Bankshares*, this Court "confine[d]" its analysis to statements of opinion by directors that were not subjectively believed. 501 U.S. at 1090. The Court did not, therefore, resolve the standard for showing the falsity of opinions in the absence of allegations of subjective insincerity.

We agree with the Government that opinions sincerely held may nonetheless be false if they lack a reasonable basis, a longstanding and familiar test widely used under the federal securities laws. Lower courts and the common law also recognize that an opinion may be false where the maker possesses undisclosed facts that contradict the accuracy of the statement.

In this case, Respondents have alleged that Petitioners possessed facts demonstrating that the contracts referenced in its statement were invalid on the

date the statement was made. This allegation, as the Sixth Circuit found, is sufficient to allege falsity. To the extent that Petitioners' statement is treated as an opinion, Respondents have alleged facts sufficient to meet the pleading standards applicable in Section 11 actions.

ARGUMENT

I. The Representation in the Registration Statement about the Legal Validity of Contracts Is a Statement of Present, Verifiable Fact, the Falsity of Which can be Determined through the Use of Settled Principles of Law

According to the Complaint, Petitioners represented in the registration statement that "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve." Complaint ¶46. Petitioners have characterized the statement as one of opinion that can be "objectively erroneous. . . ."[3] Pet'r's Br. 18

[3] An opinion may in some cases not be objectively verifiable under any circumstances. *See Virginia Bankshares*, 501 U.S. at 1090 (petitioners describing opinions at issue in that case as "indefinite and unverifiable expressions"). *See also Restatement (Second) of Torts* §538A ("A representation is one of opinion if it expresses only . . . (b) his judgment as to quality, value, authenticity, or other matters of judgment."). In this case, however, Petitioners recognize that a statement of legal validity

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n. 4. They assert, however, that the statement at issue cannot be definitively true or false on the date made "except in the rare case in which a court has already definitively ruled on the legality of the issuer's actions." Pet'r's Br. 35. Instead, "ultimate accuracy of the stated belief hinges on future events and the decisions of judges, juries, and regulators." *Id.*

It is true that contracts described as legally valid today may be found to be invalid tomorrow. In some cases, a basis for invalidity of a contract may be known but unresolved.[4] In other cases, validity may depend upon unexpected but ultimately successful challenges by "[c]reative counsel." *See Zucker v. Andreessen*, No. 6014-VCP, 2012 WL 2366448, at *8 (Del. Ch. June 21, 2012). Sometimes the law will change, causing a contract to no longer be valid. Indeed, these sorts of uncertainties are an inherent and important attribute of the common law system, particularly with respect to corporate governance and capital-raising. *See* J. Robert Brown, Jr. & Lisa L.

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can be "objectively false." *See* Pet'r's Br. 27 (asserting that statement must be "'both objectively false and disbelieved by the defendant at the time it was expressed.'") (*quoting Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011)).

[4] We note, however, that where the speaker is aware of existing challenges to the validity of contracts, even though unresolved, a statement of legal validity may be materially incomplete under the antifraud provisions. *See Meyer v. JinkoSolar Holdings Co.*, No. 13-616-cv, 2014 WL 3747181, at *4 (2d Cir. July 31, 2014) ("Even when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth.").

Casey, *Corporate Governance: Cases and Materials* 733 (Lexis-Nexis 2012) (noting that common law countries "are typically more comfortable with legal requirements created by, or left to, the courts. The likely effect of judicially created legal requirements is that it can be changed more quickly, arguably providing both increased flexibility and increased uncertainty.").

A statement of legal validity is not, however, invariably dependent upon future events or a determination by a judge, jury, or regulator. A contract may be plainly and well understood to be invalid in the present. *See Roberts v. Lanier*, 72 So. 3d 1174, 1187-88 (Ala. 2011) (where it was "undisputed that contractual provisions for non-refundable retainers [were] unenforceable," case allowed to go forward as to whether certain defendants "misrepresented . . . that the contract as written was valid and enforceable. . . .").[5]

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[5] Requiring a definitive ruling from a court as a precondition for invalidity would preclude such a finding even where a legal opinion stated otherwise. *See* Marilou M. King, Esq. & Elizabeth S. Turqman, Esq., *Year in Review, Seminar Materials*, Health Law Update and Annual Meeting, Dallas, TX, June 4, 1997, AHLA-PAPERS P06049705 (representing that "[a]fter entering into the contract, [the company] was advised by counsel that the contract violated the federal Medicare Anti-Kickback Statute"). The need for a court decision to show invalidity seeks to impose the type of "bright-line" rule under the federal securities laws that this Court has twice rejected in other contexts. *See Matrixx Initiatives*, 131 S. Ct. at 1319 (rejecting "categorical rule" as test for materiality); *see also Basic Inc. v. Levinson*, 485

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Contracts can, therefore, be invalid *ab initio* where, for example, they lack mandatory formalities. *See First Am. Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1176 (10th Cir. 2005) ("Certain formalities . . . must take place before an agreement becomes a contract. The regulations' requirement that management contracts be approved to be valid creates no ontological mystery whereby a contract springs fully-fashioned from nothingness, but rather identifies a formality necessary before an agreement to manage a tribal gaming operation can become a contract so to manage. Lacking the formality . . . an agreement to manage does not become a contract: it is void.").

Contracts that violate the terms of a statute may be invalid. *See* Section 29(b) of the Exchange Act, 15 U.S.C. §78cc(b) (contracts made in violation of title "shall be void"); *see also Restatement (Second) of Torts* §774, cmt. a ("An agreement may be clearly illegal, as when it is forbidden by statute.").

Contracts that involve an illegal purpose may also be invalid. *See United States v. Mardirosian*, 602 F.3d 1, 7 (1st Cir. 2010) ("It is well-established that contracts for illegal purposes are void as a matter of public policy. . . . We tread no new ground in declaring that the act of demanding a fee for the return of stolen property is unlawful.").

U.S. 224, 249 (1988) ("We reject 'agreement-in-principle as to price and structure' as the bright-line rule for materiality.").

Contracts can be invalid as a result of violations of the federal Anti-Kickback statute. The law prohibits remuneration in return for patient referrals or in return for the purchase of goods, facilities, services or items paid for under a federal health care program. *See* 42 U.S.C. §1320a-7b(b); *see also* 42 C.F.R. §1001.952 (safe harbor for payments otherwise subject to Anti-Kickback statute). Contracts cannot, therefore, provide for payments that are inconsistent with these provisions. *See Nursing Home Consultants v. Quantum Health Servs.*, 926 F. Supp. 835, 843-44 (E.D. Ark. 1996), *aff'd*, 112 F.3d 513 (8th Cir. 1997) (marketing agreement "plainly falls within the literal purview" of Anti-Kickback statute and "[p]lainly . . . fails" to fall within safe harbor and, as a result, "is illegal, and hence unenforceable, in that it contemplates a business arrangement that is prohibited by §1320a-7b(b)(1), and which is not saved by the 'safe harbor' regulations."). An agreement that appears to be valid on its face but is, in reality, a "sham" designed to mask prohibited payments is an unlawful kickback arrangement. *See* Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952-01 (July 29, 1991) ("[S]ham contracts in which remuneration is exchanged for property that does not exist or space which is not used are among the most egregious kickback arrangements."). To the extent that contracts are conduits for illegal kickbacks, therefore, it will not always be necessary for an issuer to always obtain a court ruling or await future developments to know that such agreements are invalid.

Courts interpreting the federal securities laws have recognized that statements of legal validity or compliance can be matters of present fact that may be false when made. In *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 741 (9th Cir. 2008), for example, the court addressed allegations that defendants misrepresented in a merger agreement that the company was "'in compliance in all material respects with all laws'" and, specifically, that the company was "in compliance with the books and records provision of Section 13(b) of the Exchange Act. . . ." The court found that it was sufficient for plaintiff to allege "facts demonstrating that [the company] was *not* in compliance with Section 13(b) of the Exchange Act at the time the warranties were made. . . ." *Id.* at 742 (emphasis in original); *see also Reese v. Malone*, 747 F.3d 557, 578 (9th Cir. 2014) ("Statements of legal compliance are pled with adequate falsity when documents detail specific violations of law that existed at the time the warranties were made."); *In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 939 (D.N.J. 1998) ("[F]acts demonstrating [that the company] was not in compliance with the terms of the Credit Agreement from the moment it was signed would be important to a reasonable investor.").[6]

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[6] Statements with respect to contracts can be misleading in other respects. Representations about the existence of a contract can be misleading where there is no intent to perform. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("To sell an option while secretly intending not to

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Admittedly, a speaker may sometimes express a genuine belief about a matter of present fact. An opinion in these circumstances conveys uncertainty or doubt as to the accuracy of the representation. *See Restatement (Second) of Torts* §538A ("A representation is one of opinion if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact"); *see also* W. Page Keeton, *et al.*, *Prosser & Keeton on Torts* §109, at 755 (5th ed. 1984) ("Prosser & Keeton") (statement of opinion can "indicate[ ] some doubt as to the speaker's belief in the existence of a state of facts").

Where, however, the speaker possesses information establishing plain invalidity, the requisite uncertainty does not exist. Nor can the speaker create uncertainty by adding the words "[w]e believe" to the statement. As Justice Scalia reminded in *Virginia Bankshares*, "not every sentence that has the word 'opinion' in it . . . leads us into this psychic thicket. Sometimes such a sentence actually represents facts as facts rather than opinions – and in that event no more need be done than apply the normal rules for §14(a) liability." 501 U.S. 1108, 1109 (Scalia, J., concurring in part and concurring in the judgment); *see also Restatement (Second) of Torts* §538A cmt. d ("The form of the statement is not, however, controlling in all cases."); Prosser & Keeton, at 755 ("It is not, however, the form of the statement which is

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permit the option's exercise is misleading, because a buyer normally presumes good faith.").

important or controlling, but the sense in which it is reasonably understood.").

Allowing an issuer to escape liability for untrue statements of present fact in a registration statement by treating the statements as beliefs or opinions contradicts the statutory framework set out in, and policies underlying, Section 11 of the 1933 Act. *See* 15 U.S.C. §77k. In adopting the 1933 Act, Congress sought to ensure that purchasers participating in a public offering were fully informed of all facts material to the offering. *See* H.R. 85, 73rd Cong., 1st Sess. 2 (1933) ("There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.") (President's message); *see also Pinter v. Dahl*, 486 U.S. 622, 638 (1988) ("The primary purpose of the Securities Act is to protect investors by requiring publication of material information thought necessary to allow them to make informed investment decisions concerning public offerings of securities in interstate commerce.").

Congress advanced this goal by assigning to issuers a unique role in maintaining the accuracy of the registration statement. To make out a *prima facie* case under Section 11, purchasers must only "show a material misstatement or omission" in an effective registration statement. *Herman & MacLean,* 459 U.S. at 382. Evidence of the speaker's state of mind is not an element of such a claim. *See Wagner v. First*

Horizon Pharm. Corp., 464 F.3d 1273, 1277 (11th Cir. 2006) ("There is no state of mind element to a §11 claim . . . .").

For insiders and underwriters, however, evidence of falsity will generally not be enough.[7] Although these participants play a "direct role" in the offering process, Section 11 provides a defense to an inaccurate registration statement. *Herman & MacLean*, 459 U.S. at 382. *See also* 15 U.S.C. §77k(a)(1-5). Congress allows insiders and underwriters to escape liability for misrepresentations or omissions of material fact if they reasonably and actually "believe" that the registration statement is accurate after a "reasonable investigation, . . . " 15 U.S.C. §77k(b)(3). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 n. 26 (1976) ("Other individuals who sign the registration statement, directors of the issuer, and the underwriter of the securities similarly are accorded a complete defense against civil liability based on the exercise of reasonable investigation and a reasonable belief that the registration statement was not misleading.").

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[7] *See* 77 Cong. Rec. 2934 (1933) (Statement by Rep. Chapman) ("Under the terms of this bill, the corporation itself is held absolutely responsible, but its management, underwriters, and so forth, are held only to the degree of responsibility above set out. To have made them guarantors of such securities, as some urged that they should be, would have worked an intolerable hardship on many honest and responsible business men . . . .").

Issuers, however, are not allowed the same opportunity to avoid liability. Recognizing that the information in a registration statement is, for the most part, within the unique control of issuers,[8] Congress gave issuers additional incentive to verify the accuracy of the registration statement by holding them to a standard of liability that is "virtually absolute. . . ." *Herman & MacLean*, 459 U.S. at 382. Consistent with this intent, issuers are expressly denied the right to defend against a misleading representation of material fact in a registration statement by taking the position that they "believe" otherwise. *See* 15 U.S.C. §77k(b) (due diligence defense applicable to those "other than the issuer").[9] As a result, issuers can only avoid liability in a meaningful sense by ensuring the factual accuracy of the registration statement.[10]

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[8] *See* 77 Cong. Rec. 2914 (1933) (Statement of Rep. Greenwood) ("There is a peculiar fact with respect to such investments in that the corporation that issues the securities knows more about them than anyone else, and the old rule of caveat emptor, or the buyer beware, certainly should not apply to this character of investments. The man who sells them ought to give the facts, and the Government ought to require the issuer of securities to give all the facts, and be honest with the public.").

[9] The right to reasonable and actual belief in the accuracy of the registration statement is commonly referred to as the "due diligence" defense. *See* William K. Sjostrom, Jr., *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 Brandeis L.J. 549, 554 (2006).

[10] Other than the obligation to bring an action within the statute of limitations, the only defense set out in the statute was

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Allowing an issuer to treat facts in registration statements as opinions or beliefs also introduces into Section 11 what is effectively a state of mind requirement, at least where falsity is conditioned upon a showing of subjective disbelief. Purchasers seeking to establish a subjective disbelief as to facts in an effective registration statement will be required to produce evidence similar to what is needed to demonstrate scienter. *See In re Credit Suisse First Boston Corp. Analyst Reports Sec. Litig.*, 431 F.3d 36, 48 (1st Cir. 2005) ("[T]he subjective aspect of the falsity requirement and the scienter requirement essentially merge; the scienter analysis is subsumed by the analysis of subjective falsity."). As a result, purchasers will no longer be able to set out a *prima facie* case only by "show[ing] a material misstatement or omission . . . ." *Herman & MacLean*, 459 U.S. at 382.

In sum, an issuer possessing information showing that a representation of fact in a registration statement is untrue or misleading cannot defend against a claim of falsity by characterizing the statement as a belief or opinion. Such an approach does not work an unnecessary hardship on issuers. While it limits the ability to treat facts in a registration statement as a belief or opinion, this approach does not prevent the inclusion in the registration statement of any suitably qualified representation of inherently

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that the purchaser "knew of such untruth or omission . . . ." 17 U.S.C. §77k(a).

uncertain information, such as projections or other forward-looking statements. *See* Rule 175, 17 C.F.R. §230.175.

Moreover, issuers can avoid Section 11 liability altogether to the extent the relevant disclosure does not appear in the registration statement. *See* 15 U.S.C. §77k. In the absence of a duty to disclose, issuers may remain silent. *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321 (2011) (noting that antifraud provisions "do not create an affirmative duty to disclose any and all material information."). *See also Basic Inc. v. Levinson,* 485 U.S. 224, 239 n. 17 ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5."). They also may, under certain circumstances, disclose "information the substance of which is not included in the registration statement" in a "free writing prospectus . . . ." Rule 433, 17 C.F.R. §230.433; *see also* Rule 165, 17 C.F.R. §230.164. Information included in a "free writing prospectus" is not subject to Section 11 liability.[11]

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[11] *See* Securities Offering Reform, Exchange Act Release No. 52056, 70 Fed. Reg. 4472, 44759 (Aug. 3, 2005) ("Even when filed, a free writing prospectus will not be part of a registration statement subject to liability under Securities Act Section 11, unless the issuer elects to file it as a part of the registration statement.").

II. *Virginia Bankshares* Does Not Determine the Standard of Review for a Statement of Opinion that is Subjectively Believed

To the extent this Court treats the statement at issue as an "opinion," we do not agree that the appropriate standard for determining falsity is "answered" by the decision in *Virginia Bankshares*. *See* Pet'r's Br. at 2. The Court in *Virginia Bankshares* expressly "confine[d]" its analysis to cases involving subjective disbelief. 501 U.S. at 1090 ("[W]e interpret the jury verdict as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made."). The decision, therefore, left open the standard for determining the falsity of an opinion in the absence of allegations of subjective disbelief.

Particularly in the commercial context, opinions expressed by those with superior knowledge are understood to be more than a matter of pure speculation.[12] *See* Prosser & Keeton, at 760-61 ("There is quite general agreement that such an assertion is to be implied where the defendant holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff, so that his opinion becomes in effect an assertion summarizing

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[12] Congress, in adopting Section 11, recognized the "peculiar fact" that the corporation issuing the securities "knows more about them than anyone else . . . ." *See supra* note 8.

his knowledge.") (footnote omitted). Instead, they must be supported by a sufficient factual predicate. *See Virginia Bankshares*, 501 U.S. at 1093 (noting that the opinions at issue were "reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading."); *see also Restatement (Second) of Torts* §539 cmt. b ("The statement of opinion may not only imply that the maker knows of no fact incompatible with the opinion, but, when the circumstances justify it, may also reasonably be understood to imply that he does know facts sufficient to justify him in forming the opinion and that the facts known to him do justify him.").

This is particularly true where the opinion is, as is the case here, expressly characterized as a belief. A belief does more than articulate a subjective view or uncertainty. It conveys "confidence" in the accuracy of the statement. *See* 1 *Shorter Oxford English Dictionary* 213 (second definition of believe: "Put one's trust or have confidence in (or on) the truth of (a proposition, doctrine, etc.), the efficacy or advisability of (a principle, institution, practice, etc.), the existence of (a person or thing), the occurrence of (an event)"). Confidence in turn suggests a "firm trust" in the position. *See id.* at 483 (first definition of confidence: "Firm trust, reliance, faith in." Fourth definition: "Assured expectation; the state of feeling certain of."). An expression of belief, therefore, indicates to investors that the maker has a strong foundation for the statement.

The Government has, on brief in this case, asserted that an opinion can be false where it lacks "a basis that is reasonable under the circumstances." Gov.'s Br. 6. We agree that this is an appropriate standard for assessing whether an opinion has an adequate foundation. Lower courts have routinely applied the reasonable basis standard to statements of belief and opinion. *See Weiss v. SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006); *Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 557 (6th Cir. 2001) (en banc); *In re Wells Fargo Sec. Litig.*, 12 F.3d 922, 930 (9th Cir. 1993), *cert. denied*, 513 U.S. 917 (1994). Likewise the standard is commonly applied in the context of forward-looking information. *See* Rule 175, 17 C.F.R. §230.175 (safe harbor for forward-looking statements that does not apply in the absence of a "reasonable basis" for such statement).

An opinion or belief can also be false where the maker possesses undisclosed facts that contradict the accuracy of the statement. Such an understanding is consistent with the *Restatement of Torts*, see *Restatement (Second) of Torts* §539(1) (statement of opinion may be interpreted as "an implied statement (a) that the facts known to the maker are not incompatible with his opinion"), and the common law. *See* Prosser & Keeton, at 760 ("[I]t has been recognized very often that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude

such an opinion, but that he does know facts which justify it.") (footnote omitted). *See also Kimmell v. Schaefer,* 224 A.D.2d 217, 218 (N.Y. App. Div. 1st Dep't), *aff'd,* 89 N.Y.2d 257 (1996) ("[W]here one party does have superior knowledge, the expression of an opinion implies that the declarant knows facts which support that opinion and that he knows nothing which contradicts the statement.") (internal quotation marks omitted).

Lower courts interpreting the federal securities laws have recognized that a statement of belief can be false under these circumstances. *See Reese*, 747 F.3d at 579; *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 675 (6th Cir.), *cert. denied*, 546 U.S. 936 (2005); *see also Bissett v. Ply-Gem Indus., Inc.*, 533 F.2d 142, 146 (11th Cir. 1976) ("[A] plaintiff may recover upon a showing that the defendant knew, or should have known, that the facts in his possession invalidated the opinion which he expressed."). The Securities and Exchange Commission has expressed a similar position in the context of forward-looking information. *See* Securities and Exchange Commission, Br. as *Amicus Curiae* Filed in Response to Ct. Order, 1, *Slayton, et al. v. Am. Express Co., et al.*, No. 08-5442-cv, 2d Cir. Jan. 21, 2010.

In addition to the standard for subjective disbelief set out in *Virginia Bankshares*, therefore, a statement of opinion or belief can be false if it is

unsupported by a reasonable basis or the maker possesses undisclosed facts that contradict the accuracy of the statement. Respondents in this case have alleged that Petitioners were in possession of facts on the effective date of the registration statement at issue demonstrating that the contracts with pharmaceutical companies were not legally valid. Respondents, therefore, have sufficiently alleged that the Petitioners' statement was false when made or omits to state facts necessary to make the statement, in the light of the circumstances in which it was made, not misleading.

CONCLUSION

In this case, Respondents have not challenged the statement as to the validity of the contracts by resorting to arguments that rely on the uncertainty of the legal system.[13] Their claims are not dependent upon future changes in the law or the arguments of "creative counsel." They have alleged that the statement at issue was false "when made." Complaint

[13] To the extent addressing a statement that can be both historical and dependent on future developments, courts in these circumstances look to the way in which the plaintiffs have framed the claim. *See Spitzberg v. Houston Am. Energy Corp.*, No. 13-20519, 2014 WL 3442515, at *12 (5th Cir. July 15, 2014) (although conceding that the term "reserve" may be "characterized as forward-looking" in some circumstances, plaintiffs' allegations "focus on that component of the term . . . that had already occurred").

¶47. The Complaint includes a number of allegations designed to show that the contracts were not legally valid on the effective date of the registration statement. *See id.* at ¶¶47-90. The Sixth Circuit found, and we agree, that these allegations were sufficient to establish falsity. *See Ind. State Dist. Council of Laborers*, 719 F.3d at 505-07.

For these reasons, *amici* respectfully urge this Honorable Court to affirm the ruling of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

J. ROBERT BROWN, JR.
Counsel of Record
Professor of Law
Director
Corporate-Commercial
Law Program
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
2255 E. Evans Ave.
Denver, CO 80208
(720) 933-5292
jbrown@law.du.edu

CELIA TAYLOR
Professor of Law
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
Denver, CO 80208

LYMAN JOHNSON
ROBERT O. BENTLEY
Professor of Law
WASHINGTON AND LEE
UNIVERSITY SCHOOL OF LAW
Lexington, VA 24450
and Professor of Law
ST. THOMAS SCHOOL OF LAW
Minneapolis, MN 55403

JOAN MACLEOD HEMINWAY
W.P. Toms Distinguished
Professor of Law
THE UNIVERSITY OF TENNESSEE
COLLEGE OF LAW
Knoxville, TN 37909

APPENDIX

Amici Curiae

Jayne W. Barnard
James Goold Cutler Professor of Law
William & Mary Law School

Eric C. Chaffee
Professor of Law
The University of Toledo College of Law

Ronald J. Colombo
Associate Dean for Academic Affairs and
Professor of Law
Maurice A. Deane School of Law at Hofstra University

Lawrence A. Cunningham
Henry St. George Tucker III Research Professor
George Washington University Law School

Roger J. Dennis
Founding Dean & Professor of Law
Drexel University School of Law

Tamar Frankel
Michaels Faculty Research Scholar
Professor of Law
Boston University School of Law

Theresa A. Gabaldon
Lyle T. Alverson Professor of Law
The George Washington University Law School

Harry S. Gerla
Professor of Law
University of Dayton School of Law

Thomas Lee Hazen
Cary C. Boshamer Distinguished Professor
School of Law
The University of North Carolina at Chapel Hill

Thomas J. Molony
Associate Professor of Law
Elon University School of Law

Daniel J. Morrissey
Professor of Law
Gonzaga University School of Law

Lisa H. Nicholson
Professor of Law
University of Louisville
Louis D. Brandeis School of Law

Ann Morales Olazábal
Professor of Business Law
University of Miami School of Business Administration

Dale A. Oesterle
J. Gilbert Reese Chair in Contract Law
The Ohio State University
Moritz College of Law

Alan R. Palmiter
Howard L. Oleck Professor of Business Law
Wake Forest University School of Law

Frank Partnoy
George E. Barrett Professor of Law and Finance
University of San Diego School of Law

Robert A. Prentice
Ed & Molly Smith Professor of Business Law
Business, Government & Society Department
McCombs School of Business
University of Texas at Austin

Margaret V. Sachs
Robert Cotten Alston Chair in Corporate Law
The University of Georgia School of Law

Michael Siebecker
Professor of Law
University of Denver Sturm College of Law

Faith Stevelman
Professor of Law
New York Law School

Jennifer Taub
Professor of Law
Vermont Law School

Chrystyne J. Vachon
Assistant Professor of Law
University of North Dakota School of Law

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 13-435

IN THE

Supreme Court of the United States

OMNICARE, INC., *ET AL.*,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

September 2014

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen is concerned that a ruling for petitioner Omnicare, Inc., in this case would substantially diminish the protection of investors and consumers against false and misleading statements couched as "opinions." At the same time, Public Citizen has long supported protection of genuine statements of opinion against liability because of their important role in public discourse.

Public Citizen believes that the proper balance of these concerns supports the court of appeals' decision that the claims in this case may proceed because the statements at issue can potentially be shown to be false or misleading as to objective matters of fact. That showing, moreover, does not depend on whether Omnicare and the individuals named as codefendants genuinely believed the statements at the time they were made. Furthermore, that the statements here may be actionable does not mean that statements of opinion (including statements involving legal conclusions) will always be subject to challenge in litigation. Context is everything. In situations unlike the one

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

here, and particularly in noncommercial settings, statements of belief or opinion about legal compliance and similar subjects will often—indeed, usually—be protected against liability.

Public Citizen accordingly submits this brief as amicus curiae in the hope that it will assist the Court in arriving at and presenting a nuanced explanation of why the potential imposition of liability in this case is both appropriate and consistent with the protection of speech involving the expression of opinion in other circumstances.

SUMMARY OF ARGUMENT

Omnicare's position that the complaint against it fails to state a claim that its registration statement contained untrue or misleading statements rests entirely on a syllogism:

> The only "fact" conveyed by a statement of opinion or belief is the fact that the speaker held the stated belief. It naturally follows that such a statement can be "untrue" as to a "material fact" only if the speaker did not actually hold the stated belief.

Pet. Br. 11.

Omnicare's syllogism underlies all of its arguments before this Court. It is simple, easy to understand—and entirely wrong. Its premise is directly at odds with the way our legal system has traditionally dealt with the distinction between statements of fact and statements of opinion, and the circumstances in which statements framed as matters of belief or opinion may or may not give rise to liability. It is firmly established that a statement couched as one of "belief" or "opinion" may, depending on the circumstanc-

es, convey factual information that is falsifiable. Provided that any applicable requirement of proof of fault is satisfied, such a statement may serve as a basis for liability if its factual content is untrue or misleading, a question that does not turn on the speaker's subjective belief in the truth of the matter asserted.

In the area of defamation law, for example, First Amendment as well as common-law considerations provide robust protections for genuine statements of opinion and limit liability to provably false statements of fact. But merely framing a statement on a factual subject with words of opinion or belief does not exempt it from potential liability on the ground that it asserts no fact other than that the speaker held the stated belief. Rather, statements of opinion or belief may serve as the basis of liability if they are reasonably understood to state or imply false and defamatory facts about the subject of the statement.

Similarly, in the area of commercial and consumer law, statements made in the form of opinions may constitute actionable misrepresentations if a listener would reasonably understand them to contain or imply false factual assertions relating to a transaction.

These principles, moreover, are fully applicable to statements that concern questions of law or legal compliance. Although such statements in many instances will amount to protected, non-falsifiable statements of opinion, in other circumstances they may be treated as false statements of fact—or, at a minimum, as statements that are misleading without the disclosure of additional facts. Such circumstances are most likely to exist when, as here, the setting is commercial, the speaker has exclusive access to the facts relevant to its legal assertions, and the speaker

has a fiduciary or similar duty to the recipients of its statements with respect to their accuracy.

The imposition of liability for statements in the form of opinions or beliefs is a matter that must be addressed with care to ensure that robust public debate over matters on which citizens are entitled to have strong and divergent views is not stifled. But Omnicare was not engaged in any public debate over whether and to what extent kickbacks in the health care industry are or should be illegal. Omnicare sought to engage in a commercial transaction—the sale of securities. In connection with that activity, Omnicare assured investors and regulators that its corporate conduct was lawful. And even while specifically referencing the prohibition on kickbacks that it was violating, Omnicare asserted that it "believe[d]" its contractual arrangements were "legally ... valid" and "in compliance with applicable federal and state laws." *See* Resp. Br. 10–12 (citing registration statement). In the context of the duty of care applicable to the preparation of a registration statement, a reasonable investor would understand that Omnicare and its individual officers and directors were saying that they had investigated and were aware of no contractual arrangements that would violate the anti-kickback statute. That factual statement can be determined to be false or misleading and can serve as a basis for liability if it is.

ARGUMENT

I. Omnicare's Conception of Falsity Is at Odds with the Way the Law Has Long Treated Factual Statements Framed as Matters of Belief or Opinion.

Omnicare's insistence that only subjective falsity can make a statement that is framed as one of opinion actionable has no basis in long-established legal principles dealing with such statements. Courts long ago developed doctrines that clarify when ostensible statements of opinion may be treated as objectively false statements of fact. The same test applies both to defamation and misrepresentation claims: Statements that imply objectively falsifiable factual assertions may be actionable even when they are expressed as matters of belief or opinion.

Common-law and First Amendment limitations on liability for defamation have converged on a fundamental point: Liability may be imposed only for a *false* and defamatory statement of fact concerning the plaintiff. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). It follows that if Omnicare's syllogism were correct—that is, if a statement of belief conveyed only the fact that the speaker held a belief and hence could be false only if he did not—then liability could not be imposed for a defamatory statement prefaced "I believe" unless the plaintiff proved the defendant did not subjectively believe the statement. That is not how the law of defamation treats such statements.

To be sure, the law of defamation, both in its common-law and constitutional dimensions, affords very substantial protection to statements that genuinely involve matters of opinion. That protection rests

in part on the insight that "there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Thus, the constitutional requirement that a defamation plaintiff prove that the defendant made a false statement "ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

This constitutional protection for opinion, and the even broader protection for opinion provided by common-law principles in many jurisdictions, provides the "breathing space" that "[f]reedoms of expression require in order to survive." *Id.* at 19 (citations and internal quotation marks omitted). As a result, "rhetorical hyperbole" or "imaginative expression," *id.* at 20, as well as "a subjective view, an interpretation, a theory, conjecture, or surmise," is protected against the imposition of liability. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993); *see also, e.g.*, *Gardner v. Martino*, 563 F.3d 981, 986–90 (9th Cir. 2009); *Levin v. McPhee*, 119 F.3d 189, 196–97 (2d Cir. 1997); *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 313–19 (D.C. Cir. 1994); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 727–31 (1st Cir. 1992).

Extensive as these protections are, this Court has emphatically rejected the view that there is "a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich*, 497 U.S. at 18. In particular, the Court in *Milkovich* pointed out that merely prefacing a statement that has factual content with words such as "I think," "I believe," or "In my opinion" does not alter its essential factual and falsifiable character, ameliorate the harmful impact of its false

and defamatory content, or otherwise justify insulating it from potential liability. *See id.* at 18–19. Quoting Judge Friendly, the Court stated that it "would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* at 19 (quoting *Cianci v. New Times Pub'g Co.*, 639 F.2d 54, 64 (2d Cir. 1980)).

The Court did not limit its refusal to grant blanket immunity for statements couched as opinion to statements that merely tack the words "I believe" or the like to statements of fact. Rather, as the Court pointed out, "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* "Simply couching such statements in terms of opinion does not dispel these implications[.]" *Id.* at 18–19. Thus, the Court held, if (and only if) a statement implies facts whose falsity can be proved, then the statement is actionable even if it was expressed in the form of an opinion. *Id.* at 20. In this way, the constitutional principles that require a defamation plaintiff to prove the falsity of an allegedly defamatory statement are fully consistent with the common-law principle that an actionable falsehood may be either "expressly stated or implied from an expression of opinion." *Id.* (quoting Restatement (Second) of Torts, § 566, Comment *a* (1977)).

Moreover, as the Court in *Milkovich* explained, determining the truth or falsity of a statement that, though framed as one of opinion, implies an assertion of objective fact does not involve an inquiry into the statement's subjective truth (*i.e.*, whether the statement in fact reflected the speaker's opinion), but into the objective truth of the implied assertion of fact. *See id.* at 20, n.6; *id.* at 21. For example, "If a speaker

says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth." *Id.* at 18. If that factual conclusion can be proved untrue, the speaker is potentially subject to liability for defamation. *Id.* at 19.

Thus, acceptance of Omnicare's position that a statement couched as one of belief can present no issue of truth or falsity other than whether the speaker believed what he said would be fundamentally inconsistent with the treatment of such statements in *Milkovich* and the law of defamation. A ruling for Omnicare would therefore either upset well-settled principles of defamation law that this Court and others have repeatedly considered and applied, or create a greater degree of protection for statements of opinion in securities law than in defamation law.

The latter result would be particularly odd given that the speech at issue in this case is commercial speech that is, under the statute, subject to liability not only if it contains an untrue statement of fact but also if it is misleading in the absence of additional factual disclosures. *See* 15 U.S.C. § 77k(a); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651–52 (1985) (holding that the interest in preventing deceptive or misleading commercial speech is sufficient to support reasonable disclosure requirements). By contrast, defamation law typically involves speech that is fully protected by the First Amendment unless it is actually "provable as false." *Milkovich*, 497 U.S. at 19 (citing *Hepps*, 475 U.S. 767). Neither the Constitution nor the common law permits imposition of defamation liability merely because a statement is misleading without additional disclosures. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)

(holding that a public figure may not recover damages for offensive speech absent a false statement made with actual malice).

Not surprisingly, therefore, this Court considered *Milkovich*'s discussion of falsity instructive when it decided, in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), that a corporate director's statement of opinion could not be actionable under the securities laws based solely on its claimed subjective falsity, but could be a basis for liability under the traditional doctrine that implied statements of fact are actionable. *Id.* at 1096, 1098. As both the respondents and the United States demonstrate in their briefs, Omnicare's argument turns *Virginia Bankshares* on its head. We will not repeat that discussion here, except to point out that *Virginia Bankshares*' discussion of truth in the context of statements couched as opinion is consistent with the principles applied in defamation law, while Omnicare's is not.

Long-established doctrines of commercial and consumer law similarly allow claims based on fraud or misrepresentation stemming from statements of opinion if those statements imply objective facts. A statement of opinion by a party to a transaction often implies that there are facts that justify the opinion. If that implied factual basis is absent, the statement can be found to be false or misleading and serve as a basis of liability for misrepresentation. *See* Restatement (Second) of Torts § 539; *id.* Comments *a* & *b*.

Whether a statement is an assertion of fact or mere opinion or "puffery" is a factual inquiry that does not turn on whether the statement is phrased in the form of an opinion. "The test is 'whether the seller assumes to assert a fact of which the buyer is igno-

rant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.'" *Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286, 1290–91 (6th Cir. 1982) (citation omitted); *see also Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) ("we should treat very differently the expressed opinion of a chemist to a layman about the properties of a composition from the same opinion between chemist and chemist, when the buyer had full opportunity to examine").

Again, this Court applied this standard to securities law in *Virginia Bankshares*, holding that "conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." 501 U.S. at 1093. The factual basis for an opinion can be attacked through the normal evidentiary process and, if found lacking, can show that the expression of opinion was false or misleading. *Id.* (citing *Vulcan Metals Co.*, 248 F. at 856). Thus, the stated belief of the directors in *Virginia Bankshares* that a proposed merger would increase share value "depended on ... provable facts about the Bank's assets, and about actual and potential levels of operation"—not facts about the directors' subjective beliefs. *Id.*

Adopting Omnicare's contrary view would either broadly threaten protection of consumers and commercial actors against misrepresentations that are couched in terms of the speaker's belief or opinion, or would give offerors of corporate securities a privileged position among fraudsters by exempting them from generally applicable standards. Neither course is justified.

II. Statements Concerning Legal Compliance May Constitute Actionable False or Misleading Statements of Fact.

Statements about compliance with the law, even if framed as opinions, are—like other ostensible matters of opinion—potentially actionable if they imply objective facts. Both the law of defamation and that of misrepresentation recognize that, in appropriate circumstances, statements about whether a person has complied with or violated the law, and other statements involving legal matters, may give rise to liability.

In the area of defamation, specific accusations of criminal or illegal conduct have traditionally been treated as libel *per se*—meaning plaintiffs do not need to allege special damages—and generally remain actionable if they imply falsifiable facts. *See Gross v. N.Y. Times Co.*, 623 N.E.2d 1163, 1168 (N.Y. 1993). Couching such a statement as a "legal opinion" does not by itself shield it from liability if it is objectively provable or falsifiable. *See id.* at 1169; *Harrell v. Colonial Holdings, Inc.*, 923 F. Supp. 2d 813, 824 (E.D. Va. 2013). Statements that, in context, represent genuine accusations of specific criminal conduct may raise objectively provable issues as to (a) whether the person engaged in the conduct at issue and (b) whether such conduct was illegal. *Id.* Thus, "concrete acccusations of criminality" may be actionable even if they are "asserted as opinion." *Gross*, 623 N.E.2d at 1169.

By contrast, a statement that is "too vague" to allege specific criminal conduct is not actionable, nor is a statement that, in context, is "an expression of opinion or rhetorical hyperbole." *Id.* Thus, in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970), this Court held that, in context, the defend-

ant's use of the term "blackmail" was not an accusation of a crime but a "vigorous epithet" expressing the opinion that the plaintiff's "negotiating position [was] extremely unreasonable." *See also 600 W. 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 932–33 (N.Y. 1992) (holding that the defendant's statements about "fraud[]," "bribery," and "corruption" were not actionable because they "cannot be construed to allege facts"); *Brahms v. Carver*, __ F. Supp. 2d __, 2014 WL 3569347, at *4–5 (E.D.N.Y. July 18, 2014) (holding that the defendant's characterization of the plaintiff on an internet forum as a "2-bit thief and counterfeiter," in context, was not a provable statement of fact but "rhetorical hyperbole"). The requirement that an actionable statement be objectively falsifiable also means that pure legal opinions, such as an analysis comparing certain assumed facts to an analogous case offered to assess a legal question, are not actionable if they do not make or imply factual assertions. *McNamara v. Costello*, 2008 WL 142723, at *3–4 (Mass. Super. Ct. Jan. 2, 2008).

In the law of misrepresentation, the trend is likewise to treat statements of legal opinion as subject to liability to the same degree as other statements of opinion. *See* Restatement (Second) of Torts § 545. That is, if a statement of legal opinion implies objectively falsifiable facts, it is potentially actionable. *See id.* § 545(1). Although the common-law view was formerly that misrepresentations of law were not actionable in fraud, this view is now seen as overly rigid. Some states no longer apply any special exemptions to statements about the law, but apply the distinction between statements of opinion that imply factual assertions and those that do not regardless of whether legal questions are involved. *See, e.g., AIU Ins. Co. v.*

Deajess Med. Imaging, P.C., 882 N.Y.S.2d 812, 820 (Sup. Ct. 2009); *Travis v. Knappenberger*, 204 F.R.D. 652, 660 (D. Or. 2001).

Even courts that continue to maintain that statements in the form of legal opinions are generally not actionable as misrepresentations typically recognize four circumstances in which such statements may give rise to liability: (1) where there is a relationship of trust or confidence between the parties, (2) where one party possesses or claims to possess superior knowledge and takes advantage of the other party's ignorance, (3) where the misrepresentation concerns the law of a foreign jurisdiction, and (4) where the misrepresentation includes an express or implied misrepresentation of fact. 26 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 69:10 (4th ed. 2003); *Bowman v. City of Indianapolis*, 133 F.3d 513, 519 (7th Cir. 1998); *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 154 (Colo. 2007). The fourth "exception," of course, is merely a restatement of the general condition under which any statement in the form of an opinion may constitute an actionable misrepresentation of fact.

Here, Omnicare's assertions fall comfortably within the exception for implied misrepresentations of fact. A statement of law can be an actionable misrepresentation if it implies that facts exist to justify the conclusion of law. *Hoyt Props., Inc. v. Prod. Resource Grp., L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007); Restatement (Second) of Torts § 545(1). For example, a statement by an attorney that there is no way to pierce the corporate veil in a given case is not necessarily a statement merely about what the law is. *Hoyt*, 736 N.W.2d at 319. It may also express a factual as-

sertion that the business operations of the two companies involved in the case would not support a piercing claim—for example, that no facts known to the attorney indicate that the companies have not observed corporate formalities. *Id.*

Likewise, Omnicare's statement that it believed it was in compliance with the laws applicable to its contractual relationships with drug companies similarly implied (if it did not directly state) that the facts concerning those contractual relationships would not constitute a violation of the law. Omnicare's statement thus was not only, or even principally, an opinion about the law, but was primarily an assertion of facts about Omnicare's business (like the "fact" that it was not accepting kickbacks) that could not have been known to investors. Nothing prevents that assertion of fact, even if it was merely implied, from being proved true or false.

Moreover, a statement of law can also be actionable when a relationship of trust leads one party justifiably to believe the representations of law made by the other. *Busiere v. Reilly*, 75 N.E. 958, 960 (Mass. 1905). Because corporate directors and officers owe shareholders a fiduciary duty of loyalty that may be violated when they knowingly withhold material information, *see In re Reliance Sec. Litig.*, 91 F. Supp. 2d 706, 732 (D. Del. 2000), a representation of law in a corporate statement falls within this exception. That the statute at issue here, 15 U.S.C. § 77k(c), expressly imposes a duty of care designed to codify the fiduciary duty of officers and directors, *see* Resp. Br. 5 & n.2, underscores the point.

Finally, courts have recognized that legal opinions may be actionable in settings "where the party mak-

ing the misrepresentation has or professes to have superior knowledge which is not reasonably available to the person to whom the representation is made." *Brodeur*, 169 P.3d at 154 (quoting *Seal v. Hart*, 755 P.2d 462, 464 (Colo. App. 1988)). Here, Omnicare had superior knowledge of its own contractual arrangements with drug companies. The very purpose of Omnicare's statement was to assure investors and regulators that those with the best knowledge of the company's affairs (that is, the company itself and its officers and directors) had conducted a reasonable inquiry and determined that the company's operations conformed to applicable legal requirements. That conclusion, even though framed as a "belief" about a matter involving both law and fact, is subject to objective testing as a matter of truth or falsehood.

III. Recognizing That the Complaint in This Case States a Claim Against Omnicare Is Consistent with the Caution That Courts Should Exercise in Addressing Genuine Questions of Opinion.

Although the law does not, as Omnicare asserts, support the view that statements couched as ones of opinion or belief cannot, in any circumstances, be treated as assertions of objective fact and subjected to liability, courts must exercise care in assessing such statements. Statements of opinion, particularly statements about the operation of laws and their potential application, should not lightly be treated as statements of fact, particularly in settings where doing so would risk chilling protected speech and debate over matters of public concern (as may often be the case where the issue arises in a defamation action).

Thus, the assessment of such statements requires a sensitive consideration of the context in which they are made and how that context would affect the way a reasonable recipient of the statement would understand it. As one federal district judge recently stated, "context is key." *Brahms*, 2014 WL 3569347, at *5. Relevant considerations include not only the words used, and whether in the abstract they are amenable to interpretations under which they present objectively *determinable* issues of fact, but also such matters as the nature of the forum in which they appear, the reasonable expectations of readers or listeners concerning discourse in that forum, whether the statements are made in the context of a public debate involving the expression of subjective opinions, and whether the speaker is or purports to be a person who possesses access to factual information about the subject. *See Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1121–26 (C.D. Cal. 1998), *aff'd*, 210 F.3d 1036 (9th Cir. 2000) (per curiam); *see also*, *e.g.*, *Letter Carriers v Austin*, 418 U.S. 264, 283–84 (1974); *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 853–56 (10th Cir. 1999); *Summit Bank v. Rogers*, 142 Cal. Rptr. 3d 40, 60–63 (Cal. Ct. App. 2012); *Moats v. Republican Party*, 796 N.W.2d 584, 596–597 (Neb. 2011); *Wampler v. Higgins*, 752 N.E.2d 962, 976–82 (Ohio 2001). Consideration of these factors is essential to a determination of whether a statement is genuinely susceptible to a reasonable interpretation as an assertion of objectively ascertainable facts that may potentially serve as a basis of liability.

Here, all these considerations point toward treating Omnicare's statements as ones of fact, subject to liability if they are proved false. First, Omnicare's

words (notwithstanding that they were stated as a matter of "belief") make an assertion on a matter that "is sufficiently factual to be susceptible of being proved true or false," *Milkovich*, 497 U.S. at 21—whether Omnicare's contracts violated the criminal prohibition on kickbacks. That issue could be tried in a criminal prosecution of Omnicare; it can equally be tried in a case testing whether Omnicare's denial of criminal activity was true or false.

Second, the context confirms that a reasonable recipient of Omnicare's statements would construe them as making a true factual claim rather than as merely expressing an unverifiable opinion. The statements were made not in a political advertisement or debate, internet chat room, op-ed column, letter to the editor, radio talk show, or some other forum where rhetoric and opinion hold sway, but in a legally mandated registration statement subject to the requirement that its disclosures be truthful, non-misleading, and complete. 15 U.S.C. § 77k(a). And the speakers—the company itself, its officers and its directors—were not only those in the best position to know its practices, but were specifically charged to base their statements on "reasonable investigation," *id.* § 77k(b)(3), and owed a duty of care to the recipients of the statement.

Third, nothing in the statement suggests that it reflects an expression of Omnicare's opinion about whether contracts containing kickbacks are or ought to be illegal. Indeed, while one might expect Omnicare to express such opinions in a public debate over the application of anti-kickback laws, a reader would not expect to encounter an opinion of that nature in a document of this kind. Nor does the registration

statement suggest to a reasonable reader that Omnicare is basing its "belief" that its contracts are legal on some aggressive or idiosyncratic opinion that such arrangements are not in fact illegal.[2]

In short, a reasonable reader of Omnicare's registration statement would understand it to be equivalent to a factual statement that Omnicare did not participate in kickback arrangements of the type condemned by federal law. Omnicare's assertion that, as a matter of law, its statement cannot be construed as containing any factual statement other than that it subjectively "believed" it was in compliance is flatly at odds with longstanding principles determining the law's treatment of statements of belief or opinion. When those principles are properly applied, Omnicare's contention that its statement cannot be actionable must be rejected.

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[2] Even if Omnicare's "belief" was based on such an opinion, it would surely be misleading for Omnicare to assert its compliance while omitting facts as to the nature of its contracts that would have allowed investors and regulators to understand that Omnicare's position reflected a dubious legal interpretation rather that the actual legitimacy of its contracts.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

OMNICARE, INC., *et al.*,

Petitioners,

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KEVIN M. CARROLL
THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, DC 20005
(202) 962-7300

RICHARD D. BERNSTEIN
Counsel of Record
JAMES C. DUGAN
ZHEYAO LI
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
(202) 303-1000
rbernstein@willkie.com

Counsel for Amicus Curiae The Securities Industry and Financial Markets Association

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. Among other things, SIFMA's members underwrite almost every public offering that is subject to section 11 of the Securities Act of 1933 (the "1933 Act"). SIFMA has offices in New York and Washington, D.C. and is the United States regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise matters of vital concern to participants in the securities industry.

SIFMA has appeared before this Court as *amicus curiae* in many cases involving issues arising under the federal securities laws, most recently in *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), *Credit*

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1. The parties have consented to the filing of this brief. Petitioners and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus curiae* briefs.

Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

Suisse Securities (USA) LLC v. Simmonds, 132 S. Ct. 1414 (2012), *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

This case involves important issues regarding liability under the federal securities laws for opinions in public offering documents. These issues are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. Resolution of these issues will have a profound effect on SIFMA's members.

SIFMA's members participate in a variety of public offerings, including initial public offerings, secondary equity offerings, and registered offerings of debt securities. To focus on initial public offerings as an illustration, the process of taking a company public is a complicated one, with numerous players, considerations and risks. After a company decides to go public, it generally selects one or more investment banks to underwrite—sell—its shares to the public in the offering. The lead underwriter generally forms a syndicate of underwriters to assist in the purchase and distribution of the securities that are the subject of the offering. A variety of factors lead to syndicate formation, not the least of which is the need to spread the capital risk associated with the offering and the general desire by issuers for wide distribution of their securities. Considerable activity occurs before the offering.

The issuer and its counsel put together a registration statement, which includes the preliminary prospectus, to be filed with the Securities and Exchange Commission

(the "SEC"), containing information about the issuer and the offering, except the price and the date the securities will be offered for sale (which are not yet established). On behalf of the syndicate, the lead underwriter (and, sometimes, other syndicate members) investigates factual statements in the registration statement.

Using the preliminary prospectus, the issuer and the lead underwriter (and the other syndicate members) then attempt to build, as well as gauge, market interest in the offering, which will influence subsequent negotiations on price. Once the SEC declares the registration statement effective, which entitles the underwriters to sell the securities to investors, the price of those securities is set. The issuer then sells the securities to the underwriters.

Section 11 of the 1933 Act imposes liability for misstatements and omissions of material *facts* in a registration statement, not only upon the issuer of the securities, but also sometimes upon other parties including underwriters. An important defense available to underwriters (but not issuers) is the due diligence defense. Under this defense, underwriters avoid section 11 liability if they can prove that, after a reasonable investigation, they had reasonable ground to believe, and did believe, that the registration statement did not contain a misstatement or omission of material *fact*.

The Sixth Circuit has held that statements of opinion in registration statements are actionable under section 11 just as if they were statements of "material fact." If allowed to stand, this approach would create a dramatic change in the scope of section 11—a statute that has worked effectively (and without significant alteration by

Congress) for 81 years and has helped give the United States the broadest and strongest capital markets in the world. The Sixth Circuit's novel view would create uncertainties and undermine the effective and efficient functioning of the securities markets. In particular, when an issuer gave an honest but incorrect opinion, the decision below would increase the liability risk and costs of underwriting and will further burden the U.S. capital markets. This would be especially true during the period of uncertainty when the federal courts were addressing what is required for an underwriter to have a due diligence defense concerning the correctness of an opinion. Particularly for companies in new technologies, the uncertainties and additional costs presented by the Sixth Circuit's approach may drive securities offerings to foreign markets. Such a dramatic change in the scope of section 11—if it happens at all—is the prerogative of Congress, not the courts. The Sixth Circuit's decision should be reversed.

STATUTORY PROVISIONS INVOLVED

Section 11 of the 1933 Act, 15 U.S.C. § 77k, provides in part with emphasis added, that:

> (a) In case any part of the registration statement, when such part became effective, contained *an untrue statement of a material fact* or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of *such untruth or omission*) may . . . sue [certain parties,

> including] (5) every underwriter with respect to such security. . . .
>
> (b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof . . . (3) that (A) . . . he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were *true* and that there was no omission to state a material *fact* required to be stated therein or necessary to make the statements therein not misleading. . . .

SUMMARY OF ARGUMENT

Section 11 of the 1933 Act provides for liability for "an untrue statement of a material fact" made in registration statements. 15 U.S.C. § 77k.[2] This Court has previously held, in interpreting the indistinguishable section 14(a) of the Securities Exchange Act of 1934, that a statement of opinion "may be open to objection . . . solely as a misstatement of the psychological *fact* of the speaker's *belief* in what he says." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095 (1991) (emphases added). *Virginia Bankshares* has been recognized by the Second,

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2. Although not addressed by the Sixth Circuit's opinion below, section 12(a)(2), in certain circumstances, likewise provides for liability for "an untrue statement of a material fact" contained in a prospectus or oral communication. 15 U.S.C. § 77*l*(a)(2). Underwriters are often targeted as defendants in section 12(a)(2) cases.

Third, and Ninth Circuit as applying to section 11 of the 1933 Act. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009); *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 372 (3d Cir. 1993).

The Sixth Circuit's decision below, however, adopted a novel and expansive reading of section 11 that conflicts with the indistinguishable *Virginia Bankshares* decision and the law of other circuit courts that have applied that decision to section 11. The brief of Petitioner Omnicare, Inc. has demonstrated why this Court should reverse the Sixth Circuit's decision given the only very limited sense in which a statement of opinion can be considered "an untrue statement of a material fact."

Rather than restate the Petitioner's arguments, this brief demonstrates additional reasons why the Sixth Circuit's position is untenable. The Sixth Circuit's ruling would make statements of opinion actionable as if they were statements of material fact. This would create uncertainty about the express due diligence defense under section 11, especially when offering documents may contain disputable opinions. In particular, making a statement of opinion actionable as if it were a statement of fact would breed potential issues about how much underwriter diligence was necessary in order to establish the defense that the underwriter reasonably believed that the issuer's opinion was correct. Those issues would very likely arise as opinions on accounting, legal, and other issues are often subject to strong differences of opinion. This could expose underwriters to trials in massive securities cases because, as we know from professional malpractice cases, challenges to opinions are too often resolved by juries.

The effects of this exposure on the economy would be pronounced. The result of the Sixth Circuit's rule becoming the law nationwide may well be that fewer U.S. companies are able to raise capital, and that more companies may choose foreign markets to issue securities.

ARGUMENT

Petitioner Omnicare, Inc. has already demonstrated that, under the plain meaning of the phrase "untrue statement of material fact" as used in section 11, a statement of opinion is actionable only if the speaker did not genuinely believe the stated opinion. Omnicare's brief has also demonstrated that the language of section 11 of the 1933 Act and Rule 14a-9 under the 1934 Act are indistinguishable on this point. Therefore, the Sixth Circuit improperly failed to follow *Virginia Bankshares*.

The Sixth Circuit's rule that a statement of opinion is actionable as if it were a statement of fact also would create practical difficulties in the application of the statutory "due diligence" defense for underwriters and impose significant additional costs on underwriters, to the detriment of the U.S. capital markets. These problems are discussed below.

A. THE SIXTH CIRCUIT'S RULE WOULD CREATE UNCERTAINTIES FOR UNDERWRITERS CONCERNING SECTION 11'S DUE DILIGENCE DEFENSE.

Section 11 is *not* a strict liability statute for underwriters. When its affirmative defenses are taken into account, section 11 imposes liability only on underwriters that underwrite without a "reasonable investigation" that

reveals "a reasonable ground to believe" that the issuer's challenged statements "were true." 15 U.S.C. § 77k(b)(3)(A) (quoting affirmative defense).[3]

As *Stoneridge* made clear, section 11 reaches underwriters in their role as non-speaking "secondary actors." *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 166 (2008). Likewise, *Central Bank* recognized that underwriters' 1933 Act liability is based not on their making a statement themselves, but rather for offering or selling securities "by means of" the issuer's false statements in offering documents. *Cen. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 179 (1994); *see also SEC v. Tambone*, 597 F.3d 436, 461 (1st Cir. 2010) (en banc) (holding that a securities professional cannot be said to "make" a statement in the issuer's offering document).

Because underwriters do not themselves speak in offering documents, they have a due diligence defense with regard to any factual misstatements made by the issuer. *See* 15 U.S.C. § 77k(b)(3)(A). The due diligence defense under section 11 is present when, at the time that the "registration statement became effective," the underwriters had conducted a "reasonable investigation," giving them "reasonable ground to believe and [they] did believe . . . that the statements therein were true." 15 U.S.C. § 77k(b)(3)(A). This defense is satisfied when "underwriters . . . make some reasonable attempt to

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3. Likewise, an underwriter is not liable under section 12(a)(2) for "an untrue statement of a material fact" in a prospectus when the underwriter "did not know, and in the exercise of reasonable care could not have known, of such untruth." 15 U.S.C. § 77*l*(a)(2).

verify the data submitted to them [by the issuer]." *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 697 (S.D.N.Y. 1968) (emphasis added).

The application of this defense is straightforward if *Virginia Bankshares* applies to section 11 such that the only fact conveyed by an issuer's statement of opinion is that the issuer genuinely holds the opinion. Under the *Virginia Bankshares* approach, underwriters have a due diligence defense when they reasonably investigate and reasonably believe the *issuer's* factual statement that it actually believes *its* opinion.

The Sixth Circuit's rule, in contrast, would create significant uncertainty. Suppose, for example, an issuer's registration statement expressed the opinion "We believe our facility's location gives us a competitive advantage." Under the Sixth Circuit's view, a plaintiff could file a claim arguing that the facility's location did *not* give it a competitive advantage, no matter that the issuer actually believed the statement to be true at the time. The underwriter's due diligence defense would turn on whether it "had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein . . . ." 15 U.S.C. § 77k(b)(3)(A). But what exactly is the underwriter to take reasonable steps to assess as "true"? Should the underwriter determine the "truth" of management's assertion that it held this belief? Or must the underwriter assess whether the most persuasive opinion is that the facility's location does give a competitive advantage? Under the Sixth Circuit's

interpretation of section 11, the answer is unclear and class action counsel would certainly seek to impose the broader obligation, leading to the attendant problem of how exactly underwriters would go about making such an assessment of the competitive effect on the issuer's business.

In this respect, the Sixth Circuit's rule would create litigation and risk for underwriters. This is because issuer opinions often address judgment-laden issues on which opinions may differ. For example, most of the section 11 litigation about opinions has addressed opinions by issuers with regard to legal and accounting issues, which may be the subject of debate among reasonable professionals. *Omnicare* itself concerns opinions on legal compliance and accounting matters. 719 F.3d at 501. *Fait* concerned accounting for goodwill and loan loss reserves. 655 F.3d at 106. *See also, e.g., In re Apple REITs Litig.*, No. 11-CV-2919, 2013 WL 1386202, at *14 (E.D.N.Y. Apr. 3, 2013) (valuation of real estate investment trust shares not traded on an exchange); *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 943 F. Supp. 2d 1035, 1055 (C.D. Cal. 2013) (credit ratings and appraised values of real estate); *Bartesch v. Cook*, 941 F. Supp. 2d 501, 511-12 (D. Del. 2013) (carrying value of a geothermal generation plant in context of alleged impairment); *In re Am. Int'l Grp., Inc., 2008 Sec. Litig.*, No. 08-CV-4772, 2013 WL 1787567, at *4 (S.D.N.Y. Apr. 26, 2013) (existence of significant concentrations of credit risk); *Lighthouse Fin. Grp. v. Royal Bank of Scotland Grp., PLC*, 902 F. Supp. 2d 329, 345 (S.D.N.Y. 2012) (portfolio risk); *In re Gen. Elec. Co. Sec. Litig.*, 856 F. Supp. 2d 645, 657 (S.D.N.Y. 2012) (reliability of source of financing); *MHC Mut. Conversion Fund, L.P. v. United W. Bancorp, Inc.*, 913 F. Supp. 2d 1026, 1027 (D. Colo. 2012) (other-than-temporary impairment in collateralized

mortgage obligations and mortgage-backed securities); *In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 300 (S.D.N.Y. 2011) (compliance with auditing standards); *City of Monroe Emps.' Ret. Sys. v. Hartford Fin. Servs. Grp., Inc.*, No. 10-CV-2835, 2011 WL 4357368, at *14-15 (S.D.N.Y. Sept. 19, 2011) (adequacy of issuer's capitalization); *Freidus v. ING Groep N.V.*, 736 F. Supp. 2d 816, 836 (credit ratings).

Of course, issuers have lawyers and accountants that assist in preparing offering documents. Congress decided, however, that the issuer's own lawyers and accountants would be section 11 defendants *only* where they consent in writing as part of the registration statement to having prepared or certified a part thereof. *See* 15 U.S.C. §§ 77g, 77k(a)(4).

Surely, if Congress had wanted a third party to vouch for the reliability of an issuer's opinions in offering documents, section 11 instead would have made the issuer's accountants and lawyers liable whenever an offering document stated an opinion on a legal or accounting matter. Congress did not do that. It would be a poor and unjustified substitute for the courts eight decades later to rope in underwriters as responsible for the accuracy of the issuer's accounting, legal, and other opinions. Again, this would lead to uncertainty and breed litigation concerning what due diligence is required from underwriters regarding the issuer's opinions. It would take years for the courts to develop a stable body of precedent on these new issues. And since those precedents would be interpreting an 81-year-old statute, they would apply retroactively—and unfairly—to myriad securities offerings that would have already occurred during the

period of uncertainty before definitive guidance from the courts.

In the meantime, aggressive class action counsel might even argue that underwriters could not reasonably rely on the opinions of the issuer's accountants and lawyers but rather should hire a second set of accountants and lawyers to examine the accuracy of the issuer's opinions independently. Even this extreme diligence might still expose underwriters to trial risk in billion-dollar securities cases. This is because, as we know from professional malpractice cases challenging accounting, legal, and medical opinions, allegations challenging opinions are too often left to juries to decide.

B. THE UNCERTAINTIES CAUSED BY THE SIXTH CIRCUIT'S RULE WOULD HARM U.S. CAPITAL MARKETS.

All these extra risks and uncertainties create predictable—and adverse—consequences. To start, the Sixth Circuit rule would encourage issuers to say nothing about their opinions in their offering documents. That serves neither disclosure to investors nor the efficiency of U.S. capital markets. If issuers did continue to include opinions in their offering documents, this could result in increased underwriting fees as compensation for the increased risk and uncertainty.

Moreover, issuers and underwriters may choose to conduct more offerings overseas or forgo offerings altogether. This is especially true for companies in new or unproven industries, and other innovative and risky ventures, where opinions are second-guessed whenever

a stock's price falls, but where capital is most needed. *See Cent. Bank*, 511 U.S. at 189. Such unintended but natural consequences would impede economic growth in this country by decreasing the availability and increasing the cost of capital.

It would especially hinder the United States' capital markets in their efforts to compete against foreign capital markets. There is a growing world market for securities offerings, and many offerings already occur in London and elsewhere, in significant part to avoid litigation risks for offerings in the United States. *See, e.g.*, Comm. On Capital Mkts. Reg., *Continuing Competitive Weakness in U.S. Capital Markets* (May 1, 2014)[4] ("U.S. capital market competitiveness showed even greater signs of weakness in the first quarter of 2014, when measures of aversion to U.S. public equity markets remained at levels not seen since the 2007-2008 financial crisis."); PricewaterhouseCoopers, *Which Market? An Overview of London, New York, Hong Kong and Singapore Stock Exchanges*, at 1 (Sept. 2013) ("As the financial markets become increasingly global, companies have more options available to them."); Jonathan Macey, *What Sarbox Wrought*, Wall St. J., Apr. 7, 2007, at A9 ("All of a sudden it is no longer fashionable to be a U.S. public company: It's for suckers who can't access the piles of sophisticated 'global' capital available elsewhere. . . . If the U.S. is to regain its former position in the world capital market, much more will have to be done. Massive litigation risk remains . . . .").

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4. Available at http://capmktsreg.org/2014/05/continuing-competitive-weakness-in-u-s-capital-markets-4/.

For all these reasons, increased liability for opinions in registration statements—or liability that is increasingly unpredictable, as it would be under the Sixth Circuit's view—may well drive securities offerings overseas. *See* Michael Bloomberg & Charles Schumer, *Sustaining New York's and the US' Global Financial Services Leadership*, at ii (Jan. 2007) ("the legal environments in other nations, including Great Britain, far more effectively discourage frivolous litigation" while "the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business—and driven away potential investors").

This Court has rejected the expansion of private securities class actions when, as here, "[t]he practical consequences of an expansion, which the Court has considered appropriate to examine in circumstances like these, provide a further reason to reject [the expansive] approach. . . ." *Stoneridge*, 552 U.S. at 163 (internal citations omitted). Increasing litigation risks "rais[es] the costs of doing business. Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." *Id.* at 164.

The Sixth Circuit's decision below represents a major expansion of securities law liability. It would change market participants' long-settled expectations regarding the possible extent of securities liability for opinions. For instance, it would overturn two decades of settled law limiting when an opinion is a false statement of fact within the Second Circuit. *See Shields v. Citytrust Bancorp,*

Inc., 25 F.3d 1124, 1131 (2d Cir. 1994) (addressing whether plaintiff had adequately alleged a false statement of fact in a section 10(b) case, and holding that "reasons, opinion or belief . . . can be actionable under the securities laws if the speaker knows the statement to be false") (citing *Virginia Bankshares*). Many participants in the national securities market rely on the Second Circuit. *Cf. Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 274, 276 (2010) (Stevens, J., concurring) (identifying "the Second Circuit, located in the Nation's financial center" as the "'Mother Court' of securities law"). If the Sixth Circuit's new rule were adopted, it would take the courts years to explicate the contours of incorrect opinion liability, what constituted due diligence of an opinion's correctness, and myriad other issues. In the meantime, issuers and underwriters would have to try to guess where the courts will go.

It is long past time for courts to create new claims by effectively rewriting an 81-year-old and actively litigated statutory provision. Since this Court's *Virginia Bankshares* decision in 1991, Congress has made numerous significant changes to the securities laws: the Private Securities Litigation Reform Act of 1995, the Securities Litigation Uniform Standards Act of 1998, the Sarbanes-Oxley Act of 2002, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. On none of those occasions did Congress choose to enact a rule that incorrect but honest opinions are false statements of fact. Whether to create a drastic expansion of securities liability is the province of Congress, not the courts.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

KEVIN M. CARROLL
THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, DC 20005
(202) 962-7300

RICHARD D. BERNSTEIN
Counsel of Record
JAMES C. DUGAN
ZHEYAO LI
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
(202) 303-1000
rbernstein@willkie.com

Counsel for Amicus Curiae The Securities Industry and Financial Markets Association

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AMICUS CURIAE BRIEF

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OMNICARE, INC., *et al.*,
Petitioners,

v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

RICHARD A. SAMP
MARKHAM S. CHENOWETH
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

DOUGLAS W. GREENE
Counsel of Record
CLAIRE LOEBS DAVIS
KRISTIN BENESKI*
LANE POWELL P.C.
1420 Fifth Ave., Ste 4200
Seattle, WA 98101
(206) 223-6103
greened@lanepowell.com
Counsel for Amicus Curiae

*Admitted only in Washington

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, provides a private remedy for a purchaser of securities issued under a registration statement filed with the Securities and Exchange Commission if the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." The question presented is as follows:

For purposes of a Section 11 claim, whether a plaintiff may plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, or whether the plaintiff must also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in numerous cases related to the proper scope of the federal securities laws. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. argued Mar. 5, 2014); *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005).

WLF agrees with Petitioners that plaintiffs may only allege that an opinion is "false" under § 11 of the Securities Act of 1933 by pleading that the opinion was not genuinely believed by the speaker, and that the Sixth Circuit's holding to the contrary conflicts with

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioners or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of Rules of this Court, letters of consent from all parties to the filing of the brief are on file or have been submitted to the Clerk of the Court.

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991). WLF writes separately to emphasize the importance of clarifying the standard for challenging "false" statements of opinion under all the federal securities laws. Such a clarification is needed to protect the expression of honest opinions by corporations and their officers and directors, as well as to guard the real interests of shareholders, who would be disadvantaged by a rule that deterred companies from openly sharing their opinions.

The holding in this case is important to all publicly held companies and their shareholders, because all companies disclose crucial information by means of opinions—such as subjective judgments regarding a company's business and financial condition, risks and opportunities, and policies and priorities. But WLF is particularly concerned about the impact of this decision on technology and other growth companies, whose volatile stock prices make them especially vulnerable to abusive securities class actions. For example, life sciences companies with products under development operate in an uncertain atmosphere that renders many of their core disclosures inherently subjective. They must speculate on the risks and benefits of developing products, distill voluminous and complex clinical trial results that are readily subject to alternative interpretations, and characterize the ups and downs of their rollercoaster ride toward potential approval by the Food and Drug Administration. *See* Stuart R. Cohn & Erin M. Swick, *The Sitting Ducks of Securities Class Action Litigation: Bio-Pharmas and the Need for*

Improved Evaluation of Scientific Data, 35 Del. J. Corp. L. 911, 923-25, 928 (2010).[2] By exposing corporate actors to liability whenever their subjective judgments are later determined to be "wrong," the Sixth Circuit's decision endangers the prosperity of these companies and their shareholders.

SUMMARY OF ARGUMENT

Opinions are ubiquitous in corporate communications. Corporations and their officers routinely share subjective judgments on issues as diverse as asset valuations, strength of current performance, risk assessments, product quality, loss reserves, and progress toward corporate goals. Many of these opinions are crucial to investors, providing them with unique information and insight. If corporate actors fear liability for sharing their genuinely held beliefs, they will be reluctant to voice their opinions, and shareholders would be deprived of this vital information.

The standard that the federal securities laws use to determine whether an opinion is "false" is therefore of widespread importance. Although this case only involves § 11 of the Securities Act of 1933, it poses a

---

[2] Not surprisingly, securities litigation against such companies is on the rise, and is increasingly directed at such subjective statements. *See Dechert Survey of Securities Fraud Class Actions Brought Against U.S. Life Sciences Companies* 2-3 (2013), http://www.dechert.com/files/Publication/9a791e10-3b4c-4418-a424-55bff34354bf/Presentation/PublicationAttachment/81f9beb0-b2d4-45a2-b142-0174fd11d9c2/Dechert_Life_Sciences_Survey_03-13.pdf.

fundamental question: What causes an opinion or belief to be a "false statement of material fact"? The Court's answer will affect the standards of pleading and proof for statements of opinion under other liability provisions of the federal securities laws, which likewise prohibit "untrue" or "false" statements of "material fact." Despite the complexity the courts have injected into this issue, the answer is not complicated; it is a straightforward application of common sense. An opinion or belief is not "false" if it turns out to be wrong, if some (or even many) people disagree with it, or if a judge later decides it was unreasonable. Rather, a statement of opinion is only "false" if the opinion is not genuinely held; a statement of belief is only "untrue" if the belief is not actually believed.

This Court articulated the correct standard for judging the falsity of opinions in *Virginia Bankshares*, in which it held that an opinion may be actionable as a false statement of "fact," to the extent to which it is a "misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. This holding is correct as a matter of logic and statutory interpretation, and has been applied by several circuit courts, including the First, Second, Fourth, Fifth, and Ninth Circuits, to require plaintiffs to allege the subjective falsity of opinions.

Nevertheless, confusion has persisted within the courts, with some judges continuing to rely on outdated doctrines inconsistent with *Virginia Bankshares*. As a result, in some courts, opinions are deemed immaterial

as a matter of law, suggesting to investors that they have no recourse if companies falsely portray their beliefs. At the other end of the spectrum is the Sixth Circuit decision under review, which holds that a speaker may be liable even for the expression of an honest opinion, if someone determines in hindsight that the opinion was "wrong." Pet. App. 16a-17a.

These inconsistent legal standards fail to achieve the "balance" that Justice Powell cautioned was necessary to give effect to the language and purpose of the federal securities laws. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S 723, 760-61 (1975) (Powell, J., concurring). The Securities Act of 1933 and Securities Exchange Act of 1934 were designed to "'insure honest securities markets and thereby promote investor confidence.'" *Chadbourne & Parke LLP v. Troice*, 134 S.Ct. 1058, 1067 (2014) (quoting *United States v. O'Hagan*, 521 U.S. 642, 658 (1997)). The laws achieve these goals by protecting investors from fraud and manipulation, and promoting "ethical standards of honesty and fair dealing." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (citing H.R. Rep. No. 85, at 1-5 (1933)).

But, as Justice Powell observed, the goal of preventing corporate fraud must be balanced with the need to protect against "open-ended litigation [that] would itself be an invitation to fraud." *Blue Chip Stamps*, 421 U.S at 760 (Powell, J., concurring). This balance is especially important because it is the shareholders who "ultimately bear the burden" of

meritless litigation. *Id.* at 761 n.5. Preventing such harm was one of the primary motivations behind the Private Securities Litigation Reform Act of 1995 ("Reform Act"). Congress knew that abusive litigation not only threatened corporate interests and damaged the U.S. economy, but that it also had a "chilling effect" on the "robustness and candor of disclosure" that ultimately harmed investors. H.R. Rep. No. 104-369, at 42-43 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730.

With this case, the Court has an opportunity to correct errors that have distorted the balance on both sides of the scale. In addition to reaffirming *Virginia Bankshares*, and emphasizing that the falsity of an opinion must hinge upon whether it is genuinely held, the Court can correct misguided precedent that has distorted how other elements of a securities fraud claim are applied in opinion cases—including the standards for misleading statements, scienter, and materiality. By clarifying the independent work done by each element, the Court can improve the fairness of securities class-action litigation across a wide range of cases. Companies would be assured that they would not face liability for sharing their honest judgments; shareholders would be assured that companies could not lie with impunity by simply casting their statements as opinions; and both would benefit from the application of clear and consistent standards.

ARGUMENT

I. Statements of Opinion Are a Common and Crucial Form of Disclosure.

A. Corporate Opinions Take Several Forms.

Before exploring the proper method for analyzing the falsity of opinions, it is important to understand what qualifies as an "opinion" under the securities laws. Current law provides no clear standard for making this determination, leaving most courts to make judgments on an *ad hoc* basis—often employing an "I know it when I see it" test. *See* Wendy G. Couture, *Opinions Actionable as Securities Fraud*, 73 La. L. Rev. 381, 401-04 (2013) (discussing the absence of a disciplined approach to identifying corporate opinions). The lack of a consistent standard predictably leads to inconsistent results, such that similar statements may be classified as statements of opinion, or not, depending upon the court. *Compare Hill v. State St. Corp.*, No. 09CV12146-NG, 2011 WL 3420439, at *23 (D. Mass Aug. 3, 2011) (holding statement that assets are "high quality" is *not* an opinion) *with Freidus v. ING Groep, N.V.*, 543 F. App'x 93, 95 (2d Cir. 2013) (holding statement that assets are "relatively high quality" *is* an opinion). A review of the literature and case law, and a sampling of recent company disclosures, yields four categories of corporate statements that are properly classified as opinions.

The first category encompasses all corporate statements that reflect an inherently subjective characterization, analysis, or judgment, about which

reasonable minds could differ. *See Billhofer v. Flamel Techs., S.A.*, No. 07 CIV. 9920, 2012 WL 3079186, at *10 (S.D.N.Y. July 30, 2012) ("[T]he hallmark of an opinion is that it does not express 'matters of objective fact' which can be assessed against an 'objective standard' but instead conveys a belief or 'judgment' whose 'determination is inherently subjective.'") (quoting *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110-13 (2d Cir. 2011)). Opinions in this category are not necessarily qualified by "I think" or "I believe," and often involve crucial information. Examples include: fairness opinions, *see, e.g., Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009); auditors' reports or statements of compliance with financial standards, *see, e.g., Buttonwood Tree Value Partners, LP v. Sweeney*, No. SACV 10-00537-CJC(MLGx), 2012 WL 2086607, at *2 (C.D. Cal. June 7, 2012); evaluations of assets and the adequacy of loan loss reserves, *see, e.g., Fait*, 655 F.3d at 110, 113; characterization of clinical trial results, *see, e.g., Wolfe v. Aspenbio Pharma, Inc.*, No. 11-CV-00165-REB-KMT, 2012 WL 4040344, at *8 (D. Colo. Sept. 13, 2012); appraisal of the strength of new technology, *see, e.g., Hanon v. Dataproducts Corp.*, 976 F.2d 497, 502 (9th Cir. 1992); evaluation of trends and risks, *see, e.g., Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988); and characterization of policies and practices, *see, e.g., IBEW Local 90 Pension Fund v.*

Deutsche Bank AG, No. 11 Civ. 4209(KBF), 2013 WL 1223844, at *14 (S.D.N.Y. March 27, 2013).[3]

The second category includes personal beliefs, thoughts, motivations, or feelings conveyed by individual people or groups of people. These opinions might describe reasons for taking certain actions, *see, e.g.*, *Virginia Bankshares*, 501 U.S. at 1087-88; feelings of optimism or confidence, *see, e.g.*, *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 659 (6th Cir. 2005); worries or concerns, *see, e.g.*, *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1212 (1st Cir. 1996); or feelings about people or projects, *see, e.g.*, *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1274-75 (D.C. Cir. 1994).[4]

A third category involves the expression of the "belief of the [speaker], without certainty, as to the

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[3] Everyday examples abound. A review of a dozen recent investor conference calls conducted by random companies revealed opinions including: characterizations of "positive selling price changes," a "strong new production flow," a "good bidding environment," "continued broad based organic growth," and clinical trials that "exhibited significant meaningful and long-lasting results"; and assurances regarding the "attainment of significant regulatory milestones," "demonstrable progress in advancing our . . . programs," and that "we continue to manage our [risk] exposures carefully."

[4] Examples from recent conference calls include statements indicating that company officers "believe that we can accelerate . . . growth," are "excited about our future opportunities together," think it is "an important and exciting day," and "feel much better today than we did last time we were on the call."

existence of a fact." Restatement (Second) of Torts § 538A (1977); *see, e.g.*, *In re MBIA, Inc. Sec. Litig.*, 700 F. Supp. 2d 566, 573 (S.D.N.Y. 2010). Such statements are typically made in situations where facts cannot be immediately confirmed, such as in investor conference calls, and are usually expressly qualified with a statement such as "I think."[5] Although the underlying information is factual, such statements are nonetheless opinions because they expressly represent only what the speaker believes to be true about the fact.

The final classification of opinions includes forward-looking statements, such as predictions, forecasts, statements of future plans, and evaluations of risks. Such opinions are given heightened statutory protection under the Reform Act's safe harbor for forward-looking statements ("Safe Harbor"). 15 U.S.C. §§ 77z-2 and 78u-5 (1995). However, the Safe Harbor's protections are limited to certain parties, so they do not govern all liability for forward-looking opinions, such as analyst ratings and recommendations. *See, e.g.*, *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 46-47 (1st Cir. 2005) (analyst buy ratings are actionable opinions under § 10(b)).

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[5] Recent conference call examples include officers' statements that "I think the biggest acquisition [the company] had done is . . . $1 billion or so" and "I think the authorization remaining is roughly $40 million."

B. Opinions About Current Conditions Can Be Just as Material as Forward-Looking Opinions.

For several decades, the Securities and Exchange Commission ("SEC") prohibited companies from releasing "conjectures and speculations as to the future," because it deemed them inherently unreliable, and believed the typical investor was "as competent as anyone to predict the future from the given facts." Harry Heller, *Disclosure Requirements under Federal Securities Regulation,* 16 Bus. Law. 300, 307 (1961). This policy changed in the 1970s, and decades of debate ensued regarding whether such forecasts were too uncertain to ever be material, or so valuable that they were worthy of special protection. Courts were caught in this whipsaw. *See, e.g., Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) (contending forecasts are generally immaterial as a matter of law, while simultaneously asserting they should be protected because "liability would deter companies from discussing their prospects, and the securities markets would be deprived of the information those predictions offer.").

The uncertainty was resolved when Congress passed the Safe Harbor in 1995, protecting a company's material forward-looking statements if they are either accompanied by meaningful cautionary statements *or* made without actual knowledge of falsity. 15 U.S.C. §§ 77z-2 and 78u-5 (1995). Congress determined that such strong protections were necessary to encourage

dissemination of forward-looking opinions, because it understood that "'a company's own assessment of its future potential would be among the most valuable information shareholders and potential investors could have about a firm.'" H.R. Rep. No. 104-369, at 42-43 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730 (quoting testimony of Richard C. Breeden, former SEC Chairman).

Despite the fact that they enjoy such explicit protections, forward-looking opinions are not necessarily any more material than judgments about current conditions. Indeed, the opposite is often true. Forward-looking opinions are now typically accompanied by a bevy of cautionary statements, warning of all the factors that may cause them to be inaccurate. Even without these warnings, the uncertainty of such predictions is obvious. On the other hand, investors value opinions about current conditions from company insiders, because "[s]hareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources . . . ." *Virginia Bankshares*, 501 U.S. at 1091; *see* Couture, *supra*, at 406 ("[T]he unique insights of companies and their officers and directors are essential to market efficiency.").[6]

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[6] Indeed, analysts often ask company officers for their opinions. During recent investor conference calls, analysts asked officers to "put some color" on their disclosures, "share with us what inning do you think we are in," give their "mix of impressions," discuss what they are "currently thinking," and divulge which opportunities are the "most exciting."

II. The Law Governing Opinions Is Muddled.

A. Early Law Embraced *Caveat Emptor*.

The schizophrenic nature of the current law governing statements of opinion can best be understood by tracing its evolution. Employing the doctrine of *caveat emptor*, courts long recognized "puffery" as a defense to the common law torts of deceit and fraudulent misrepresentation, reasoning that because salespeople were expected to "puff" up their products, such vague positive statements could not form the basis of a claim. *See* Restatement (Second) of Torts § 542 cmt. e (1977). Early on, this doctrine was incorporated into the securities laws, which were initially held to apply only to "facts," and not "opinions." *See* Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L. J. 227, 236, 249 (1933).

As courts began to reject the notion of *caveat emptor* as incompatible with the protective securities laws, the circuits diverged, developing differing standards for when opinions could be actionable. Some continued to hold that opinions were almost always immaterial as a matter of law. Others held statements of belief "may be actionable," and imposed both subjective and objective standards to determine falsity. *See, e.g.*, *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989) (holding opinions are actionable if they are not genuinely believed, there is no reasonable basis for the belief, *or* the speaker knows undisclosed facts that tend to seriously undermine the opinion); *Eisenberg v. Gagnon*, 766 F.2d 770, 776 (3d

Cir. 1985) (opinions are actionable if issued without a genuine belief *or* a reasonable basis).

B. *Virginia Bankshares* Held Opinions Can Be Actionable Only If Subjectively False.

In *Virginia Bankshares*, the Court definitively answered the question of whether corporate opinions could be material under the federal securities laws, finding there is "no serious question" that "such statements may be materially significant." 501 U.S. at 1090-91. In addition to holding they could be material, the Court found corporate opinions could be actionable as "fact[s]." *Id.* at 1092. The Court reasoned that a statement of belief conveyed the "fact" that the speaker held that belief, and that it was open to challenge "solely as a misstatement of the psychological fact of the speaker's belief in what he says." *Id.* at 1095.[7]

The plaintiffs in *Virginia Bankshares* alleged that a company's directors had been dishonest in claiming they supported a merger because it gave shareholders a "high value." *Id.* at 1090. A jury found the directors guilty of violating Rule 14a-9, which prohibits statements in proxy materials that are "false or misleading with respect to any material fact . . . ." 17 C.F.R. § 240.14a-9 (1990). The Court assumed the

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[7] This reasoning was consistent with prior scholarship examining opinions in the context of the tort of fraudulent misrepresentation. *See, e.g.*, W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* § 109, at 755 (5th Ed. 1984) (a statement of opinion conveys the factual representation that the speaker believed the truth of the statement when made).

verdict meant the jury had found the directors "did not hold the beliefs or opinions expressed." 501 U.S. at 1090. Implicitly holding that such a finding was necessary, the Court then examined whether a "disbelief or undisclosed motivation, standing alone" was sufficient to allege falsity. *Id.* at 1096. The Court found it was not, holding that plaintiffs must also demonstrate an opinion "expressly or impliedly asserted something false or misleading about its subject matter." *Ibid.* Justice Scalia summarized the ruling with a characterization with which no member of the Court disagreed:

> [T]he statement "In the opinion of the Directors, this is a high value for the shares" would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise.

Id. at 1108-09 (Scalia, J., concurring).

C. Confusion Remains After *Virginia Bankshares.*

Virginia Bankshares should have brought clarity and uniformity to the law governing corporate opinions. But the circuit courts were slow to embrace *Virginia Bankshares*, and there has been some disparity and confusion in its application. Meanwhile, a minority of courts have ignored *Virginia Bankshares* completely, continuing to invoke precedent incompatible with its holding. As a result, a thicket of contradictory standards remains. *See* Couture, *supra*, at 384 (courts

have adopted various tests for opinions "that are analytically unsound, that yield inconsistent results, and that fail to further the fundamental policy goal of the securities acts 'to insure the maintenance of fair and honest markets.'") (citation omitted).

A number of circuit courts have now correctly applied *Virginia Bankshares* to multiple sections of the securities laws, allowing plaintiffs to challenge opinions only by pleading subjective falsity. *See Credit Suisse*, 431 F.3d at 47 (applying *Virginia Bankshares* to § 10(b)); *Fait*, 655 F.3d at 110 (holding plaintiffs must allege opinion was "actually disbelieved" under §§ 11 and 12); *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) (same); *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 670 (5th Cir. 2004) (holding plaintiffs must show opinion was not actually held under § 10(b)); *Rubke*, 551 F.3d at 1162 (holding plaintiffs must allege opinions were subjectively false under § 11).

At the same time, however, some courts still articulate a standard that suggests some kind of objective showing of falsity is sufficient. Although the Ninth Circuit applied *Virginia Bankshares* in 2009 through *Rubke*, it did not expressly overrule its incompatible three-part *Apple* standard. *See Rubke*, 551 F.3d at 1162 (implementing *Virginia Bankshares* without mention of how it intersects with *Apple*). As a result, some courts, both within and without the Ninth Circuit, continue to refer to the *Apple* standard, which allows false opinion claims that allege *either* subjective

falsity *or* that an opinion lacked a reasonable basis *or* was undermined by undisclosed facts. As explained *infra* at 23-24, allowing opinions to be challenged on the basis that they are "unreasonable" or inconsistent with the facts subverts the subjective falsity requirement.

Increasing the confusion, some courts cite to both the *Virginia Bankshares* line of cases and the *Apple* standard, seemingly oblivious to their incompatibility. *See, e.g.*, *In re XM Satellite Radio Holdings Sec. Litig.*, 479 F. Supp. 2d 165, 177 (D.D.C. 2007) (asserting it is applying the "doctrine established by *Virginia Bankshares*," and then citing to, and actually applying, the *Apple* standard); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1228-29 (S.D. Cal. 2010) (using the *Apple* standard, but citing to *Virginia Bankshares* and *Rubke*); *but see McGuire v. Dendreon Corp.*, 688 F. Supp. 2d 1239, 1244 (W.D. Wash. 2009) (recognizing that *Rubke* implicitly overruled *Apple*).

Other courts have continued to cite directly to *Apple* (or precedent stemming from *Apple*), ignoring *Virginia Bankshares* entirely. *See, e.g.*, *Helwig v. Vencor, Inc.*, 251 F.3d 540, 557 (6th Cir. 2001) (*en banc*); *Slayton v. Am. Express Co.*, 604 F.3d 758, 775 (2d Cir. 2010); *In re Allstate Life Ins. Co. Litig.*, No. CV-09-08162-PCT-GMS, 2013 WL 5161688, at *16 (D. Ariz. Sept. 13, 2013); *Patrick v. Patrick*, No. 2:08cv450, 2010 WL 569740, at *3 (W.D. Pa. Feb. 12, 2010). Meanwhile, some courts invoke standards derived from sources other than *Apple*, but which similarly allow

plaintiffs to assert the falsity of opinions without regard to the speaker's state of mind. *See, e.g.*, *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 62 (1st Cir. 2008) (allowing liability for "unreasonable" opinions); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, ___ F. Supp. 2d ___, 2013 WL 6621024, at *27 (S.D.N.Y. Dec. 12, 2013) (holding opinions actionable if not genuinely believed *or* unreasonable *or* worded as guarantees or supported by specific facts).

Finally, some courts still use the "puffery" doctrine to automatically discount allegations against opinions—essentially applying a different standard of materiality for statements of opinion. Although the puffery doctrine was declared at one time to have "'all but gone the way of the dodo,'" it has made a resurgence. *See* Jennifer O'Hare, *The Resurrection of the Dodo: The Unfortunate Re-Emergence of the Puffery Defense in Private Securities Fraud Actions*, 59 Ohio St. L. J. 1697, 1697 (1998) (quoting 7 Louis Loss & Joel Seligman, *Securities Regulation* 3434 (3d ed. 1991)). Courts define puffery in various ways, sometimes encompassing virtually all opinions, and sometimes just a subset. *See, e.g.*, *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2004) (holding "generalized, positive statements" are puffery); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) (finding "generalized statements of optimism that are not capable of objective verification" are puffery); *Malin v. XL Capital Ltd.*, 499 F. Supp. 2d 117, 144 (D. Conn. 2007), *aff'd*, 312 F. App'x 400 (2d Cir.

2009) (collecting cases and holding opinions are generally not actionable as puffery).

Virginia Bankshares created an obvious conflict with the extreme spectrum of the puffery doctrine, under which virtually all opinions are immaterial as a matter of law, by finding that there was "no serious question" that opinions *could be* material. 501 U.S. at 1090-91. Some courts have tried to reconcile this tension by casting subjective falsity as an exception to puffery, thus mixing up the concepts of materiality and falsity, and "characterizing apples as an exception to oranges." Couture, *supra*, at 420; *see, e.g.*, *Longman v. Food Lion, Inc.*, 197 F.3d 675, 683 (4th Cir. 1999) (opinions will "often not be actionable" as puffery, unless they are "both factual and material" because they are not genuinely believed, as in *Virginia Bankshares*).

III. The Sixth Circuit Demonstrated a Basic Misunderstanding of Falsity.

The somewhat muddled precedent governing statements of opinion culminated in the anomalous Sixth Circuit decision under review, which expressly contradicts the holding of *Virginia Bankshares* and of the other circuit courts to examine this issue. The Sixth Circuit began by drawing on precedent that is a close cousin to puffery, to construct a false dichotomy between the materiality of "hard" information (facts) and "soft" information ("matters of opinion and predictions"). Pet. App. 12a. The court then jumbled the concepts of materiality and falsity, postulating that

there is "generally no duty to disclose soft information" unless "knowledge of falsity is shown," in which case, "'opinions cease to be soft information' and become hard facts."[8] *Id.* at 14a (citing *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003)). Stumbling through the maze erected by this nonsensical proposition, the court eventually concluded that this disclosure standard only applies to § 10(b), finding that because § 11 provides for strict liability, "if the defendant discloses information that includes a material misstatement . . . a complaint may survive a motion to dismiss without pleading knowledge of falsity." *Id.* at 16a.

While this statement of law is correct as far as it goes, it illustrates the Sixth Circuit's failure to distinguish the subjective falsity inquiry from "knowledge of falsity"—which, in turn, stems from its fundamental failure to examine how an opinion is different from a fact. It is not that an opinion requires a different standard of materiality (because it is "soft information") or that it necessitates a stronger showing of scienter (because "knowledge of falsity" somehow transforms it into "hard information"). A statement of opinion is different because the "material fact" that it represents inherently implicates the speaker's state of mind. Accommodation of this difference does not

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[8] This proposition also misstated the disclosure responsibilities under § 10(b), by asserting that a party who speaks on a subject has a duty to speak "fully." Pet. App. 15a. No such duty exists, unless the failure to "speak fully" causes a statement to be misleading. *See infra* at 25-26.

require an elaborate doctrine designed specifically for opinions. Rather, a straightforward application of the falsity requirement suffices: In order to show falsity, whether of facts or opinions, plaintiffs must plead that the fact represented by the statement was, in fact, "false."

But the Sixth Circuit bypassed this threshold question of how an opinion might constitute a "false" statement of "fact." Instead, it assumed, without discussion, that an opinion can be "indisputably wrong." *Id.* at 16a. The court did not explain how this wrongness was to be demonstrated, or how the truth of a statement about someone's state of mind can be explored *without* inquiring into that person's state of mind. Instead, it mechanically equated any inquiry into a speaker's thoughts with "scienter," and formalistically concluded that because "scienter" is not required under § 11, such an inquiry is improper.

This superficial analysis ignores the reasoning of *Virginia Bankshares*, which examined the nature of statements of "reasons or belief" and the ways in which they are "factual"—"as statements that the directors do act for the reasons given or hold the belief stated[.]" 501 U.S. at 1092. Any inquiry into the truth or falsity of such beliefs thus necessitates an inquiry into whether the speakers "hold the belief stated. . . ." *Ibid.* For the *Virginia Bankshares* Court, this was clearly a question of falsity, *not* scienter. Indeed, the Court expressly reserved the question of whether or not scienter was required for liability under § 14(a), and

this open question had no effect on its analysis. *Id.* at 1090 n.5.

By improperly framing the question as whether "knowledge of falsity" of opinions is required, the Sixth Circuit transformed a falsity analysis into a scienter requirement, and concluded it would be "unwise for this Court to add an element to § 11 claims" based on "tea-leaf reading" of *Virginia Bankshares*. Pet. App. 19a. But the Sixth Circuit's holding actually *removes* the element of falsity from § 11 claims challenging opinions. Under the Sixth Circuit's rule, plaintiffs must show an opinion was false because it was not genuinely believed for a claim under § 14(a) or § 10(b), but *not* when bringing a § 11 claim. This would impose a different standard of falsity for § 11 claims than for the other securities laws, even though the laws employ essentially identical language. Pet. Br. 24 & n.6.

IV. A Clear Subjective Falsity Rule Is Needed to Resolve Confusion and Promote Fairness.

WLF agrees with Petitioners that the Sixth Circuit should be reversed, and the Court should hold that plaintiffs must plead subjective falsity to state a claim under § 11. But WLF also urges the Court to seize this opportunity to resolve the inconsistencies that plague the jurisprudence regarding statements of opinion. WLF thus writes separately to emphasize the need for a clear standard for the adjudication of corporate opinions under the securities laws—a standard that is faithful to both statutory text and Supreme Court

precedent, and which emphasizes the importance of distinguishing between the elements of a securities fraud claim.

A. The Falsity Inquiry Must Examine What Makes Each Statement False.

Falsity is the fundamental element of any claim brought under the securities laws, which generally forbid either "false" or "untrue" statements "of material fact." *See* Pet. Br. 26 n.7. Because the securities statutes forbid false "statement[s] of material fact" —and not incorrect, unreasonable, or even "indisputably wrong" opinions—the proper standard must start by identifying the ways in which an opinion conveys a "fact." As the *Virginia Bankshares* Court established, opinions are "factual" statements as to what the speaker believes. 501 U.S. at 1092. Since opinions only state the "fact" of the speaker's belief, it directly follows that they are only "false" if the speaker does not genuinely believe them when they are uttered. *See, e.g.*, *Fait*, 655 F.3d at 112.

Such an analysis precludes a showing of falsity that is based solely upon any "objective" standard. *See In re Salomon Analyst AT&T Litig.*, 350 F. Supp. 2d 455, 466 (S.D.N.Y. 2004) ("It is not sufficient . . . to allege that an opinion was unreasonable, irrational, excessively optimistic, not borne out by subsequent events, or any other characterization that relies on hindsight or falls short of an identifiable gap between the opinion publicly expressed and the opinion truly held."). The fallacy in such inquiries is clear: An

opinion is not "false" because a judge later surveys the facts and, with the benefit of both omniscience and hindsight, deems the opinion to have been unreasonable. Reasonableness is always in the beholder's eye. Whether a statement is "reasonable" is itself an opinion, and a "reasonableness" standard would make a speaker liable for an honestly held opinion if someone else later reached a different subjective judgment. Indeed, there are many reasons why a company executive might hold a genuine belief that later appears to have been unreasonable, especially with the hindsight supplied by a negative outcome. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129-30 (2d Cir. 1994) ("People in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business that they manage.").

Similarly, a speaker may genuinely hold an opinion even if other people disagree with him, or there are undisclosed facts that could undermine that belief.[9] The existence of such facts, or such disagreement, does not render the speaker's opinion a lie. And securities jurisprudence has long made clear that a statement (whether fact or opinion) is not "false" just because it is

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[9] As the *Virginia Bankshares* Court observed, facts about the speaker's knowledge of information supporting or discrediting his or her opinion could be used as circumstantial evidence regarding the speaker's actual belief. 501 U.S. at 1092-93. But such facts, without more, are insufficient to show subjective falsity.

proven incorrect in hindsight. *See, e.g., Shields*, 25 F.3d at 1129.

This analysis, however, does not import a subjective falsity requirement into the standard for judging any objective *facts* that are included as part of an opinion. For example, corporate officers speaking in investor conference calls will often intertwine objective facts, subjective judgments (which should be examined as opinions), and statements that are expressly opinions.[10] In such a case, the objective and subjective elements of the statement must be distinguished, with the plaintiffs required to allege specifically which part of each statement is false, and why. Then, the proper falsity analysis should be applied separately to the portions of the statement that constitute opinions, and to those that convey facts.

The subjective falsity analysis also does not control the evaluation of whether a statement is misleading due to omissions. Whether information is "soft" or "hard," there is no general obligation to disclose it under the securities laws, even if investors may deem it material. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011); *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to

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[10] A review of recent conference calls reveals numerous examples, such as: "Worldwide organic local-currency [growth] was 4.6% in the first quarter with volumes up 3.4% and selling prices up 1.2%. We continue to experience positive selling price changes across our businesses, boosted by world-class innovation and strong new production flow, both of which are important elements of [our] business model."

disclose, is not misleading under Rule 10b-5."). Absent an affirmative disclosure obligation, disclosure is required only when necessary "'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'" *Ibid.* (quoting 17 CFR § 240.10b-5(b)); *see also, e.g.*, 15 U.S.C. § 77k (Section 11 prohibits registration statements that "omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .").

It is thus error to examine whether a specific *opinion* is misleading in isolation. And unnecessary attempts to give meaning to the concept of "subjectively misleading" can result in the subjective falsity requirement being rendered essentially meaningless. *See, e.g.*, *McGuire*, 688 F. Supp. 2d at 1244-45 (implementing the subjective falsity requirement of *Virginia Bankshares* and *Rubke*, but holding an opinion may be "subjectively misleading" if the speaker does not reveal all facts "that he knew or should know would lead someone else to a different opinion."). Rather, the proper analysis of whether a disclosure was misleading requires examination of the statement in context (including the context provided by other public statements) and an evaluation of the allegedly omitted facts, to determine if the omissions caused the statement to "affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002); *see also Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 357

(2d Cir. 2002) ("The touchstone of the inquiry is not whether isolated statements within a document were true, but whether defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor . . . ."). Because this inquiry necessarily considers a company's statements holistically, no special standards need to be incorporated simply because an allegedly misleading statement contains opinions.

A hypothetical exemplar illustrates how a court should dissect each component of a statement, and each allegation of falsity, and analyze them separately. Suppose plaintiffs challenged this prototypical statement by a corporate officer:

> Since we launched the new product, I believe we have made good progress. Demand has increased and customer feedback has been positive. I think our early numbers show roughly a 20% increase in units sold, and if this pattern continues, I would be very optimistic.

This statement includes three types of opinions identified *supra* at 7-10: an inherently subjective judgment ("customer feedback has been positive"); explicit expressions of belief ("I believe we have made good progress" and "I would be very optimistic"); and an uncertain expression of fact ("I think our early numbers show roughly a 20% increase in units sold"). All these opinions are only "false" to the extent that they were not genuinely believed by the speaker at the time of the statement. But the statement also includes

assertions of fact: that the new product has launched, that demand has increased, and that the company has received feedback from customers. If the accuracy of these factual assertions is challenged, a standard objective inquiry would suffice for evaluating falsity. *See Virginia Bankshares*, 501 U.S. at 1109-10 (Scalia, J., concurring) (advocating that normal principles governing misrepresentations should apply to facts asserted as part of an opinion).

The proper approach to analyzing this statement would therefore depend on the nature of the allegations. If plaintiffs alleged that progress was not "good," customer feedback was not "positive," or the early sales numbers had not shown a 20% increase in units sold, then they must adequately plead (and, ultimately, prove) that the speaker did not genuinely believe these statements. On the other hand, if plaintiffs alleged that at the time of the statement the product had not yet been launched, there had been no customer feedback, or demand had been plummeting, then falsity could be shown simply by demonstrating the statement was objectively untrue.

Finally, if plaintiffs claimed the statement was misleading because of omissions, they would need to examine the entire statement in context, identify which facts were allegedly omitted, and explain how those omissions caused the statement to create a false impression of the state of the company's affairs. Here, plaintiffs might be able to show the statement was misleading, if, for example, it omitted mention of

serious supply problems that meant discontinuation of the new product and a decline in revenues, thereby rendering misleading the overall impression created by the statement that the new product would continue to benefit the company in the long term.

B. Failing to Preserve Scienter as a Separate Inquiry Leads to Errors.

The Sixth Circuit's basic error was in failing to distinguish subjective falsity from scienter. It is not alone in making this mistake. Even courts that have otherwise applied *Virginia Bankshares* correctly have improperly conflated the two standards. *See Credit Suisse*, 431 F.3d at 48 ("[T]he subjective aspect of the falsity requirement and the scienter requirement essentially merge; the scienter analysis is subsumed by the analysis of subjective falsity."). In some cases, such imprecision is harmless. But in others it can have significant consequences, such as when it led the Sixth Circuit to conclude that because § 11 does not require scienter, it also does not require a showing of subjective falsity. Pet. App. 19a.

In § 10(b) cases, this lack of clarity weakens both the scienter and the falsity standards. For example, some courts have applied the "recklessness" standard of scienter to subjective falsity, resulting in an incorrect holding that an opinion is false if it was "recklessly" held—the functional equivalent of showing an opinion was unreasonable. *See Freedman v. Value Health, Inc.*, 958 F. Supp. 745, 753 (D. Conn. 1997). On the flip side, the conflation of falsity and scienter can also render

scienter meaningless, as courts conclude that because subjective falsity has been shown, scienter must follow. *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 957 F. Supp. 2d 277, 301 (S.D.N.Y. 2013) ("[I]f it is satisfactorily alleged that the defendant did not [believe his stated opinion], the elements of both falsity and scienter are met.").

Proper analysis requires the preservation of scienter as an independent element. This distinction makes clear that subjective falsity is about *falsity*, not scienter, and that the selfsame falsity standard should be used *regardless of the level of intent required by the underlying statute.* It also recognizes that, where both falsity and scienter are required, they remain fundamentally different questions. Subjective falsity asks: "Did the speaker honestly hold the opinion he expressed?" This question is essential because the nature of the falsity allegation necessitates inquiry into the speaker's state of mind. While the scienter inquiry also explores the speaker's state of mind, it asks a different question: "Did the speaker give a false opinion *with an intent to mislead investors*?" *See Fait*, 655 F.3d at 112 n.5 ("We do not view a requirement that a plaintiff plausibly allege that defendant misstated his truly held belief and an allegation that defendant did so with fraudulent intent as one and the same.").

Courts often lose track of this real scienter inquiry, because they have become accustomed to using shorthand to refer to scienter as "knowledge of falsity."

See, e.g., Pet. App. 14a. But as the Court has repeatedly made clear, scienter is about whether false statements were made with "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst*, 425 U.S. at 193-94 n.12; *Tellabs*, 551 U.S. at 319. Similarly, where a recklessness standard is employed, it is not recklessness as to *falsity*, but rather recklessness as "an extreme departure from the standards of ordinary care, . . . present[ing] a *danger of misleading buyers or sellers* that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1044-45 (7th Cir. 1977) (emphasis added).

It is true that, in many cases, falsity and scienter are "strongly inferred from the same set of facts," such that some courts examine both elements in a single analysis. *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001). This may frequently be the case when the falsity analysis examines subjective falsity. But just because the facts necessary to prove each of these elements may sometimes, or even often, overlap, does not mean they are the same inquiry. *Merck & Co. v. Reynolds*, 559 U.S. 633, 649-50 (2010) (recognizing that for certain statements "to show them false is normally to show scienter as well," but that the inquiries are nonetheless separate and "context specific"). Indeed, it is possible to have subjective falsity without scienter, or the converse, scienter without subjective falsity. In the hypothetical discussed *supra* at 27, all of the statements could have been subjectively true, yet

nonetheless made with intent to mislead: The speaker could have genuinely believed that progress had been "good" and customer feedback had been "positive," yet could have expressed those opinions as part of a broader statement designed to mislead investors.

Conversely, speakers may express opinions they do not honestly hold for a variety of reasons, only one of which is an intent to mislead investors. For instance, corporate lies may be used to advance merger or contract negotiations, promote a product, boost morale, or preserve a company's competitive edge. *See* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. Pa. L. Rev. 101, 113, 117 & n.52 (1997); *id.* at 107 ("[L]ies that influence investors may really be directed at other audiences (for example, customers or employees) in order to prevent 'runs' on external or internal resources."). A speaker may overstate his opinion because he believes "puffing" is expected and "[a]n utterly candid statement of the company's hopes and fears, with emphasis on the fears," would be "taken to indicate that the prospects . . . were much grimmer than they were." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 746 (7th Cir. 1997) (Posner, J.) ("Where puffing is the order of the day, literal truth can be profoundly misleading, as senders and recipients of letters of recommendation well know."). Or a speaker may express a false opinion because he or she is human, and humans lie for a wide variety of reasons, ranging from petty to idiosyncratic to sinister:

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost $10 at poker"); to prevent grief ("The doc says you're getting better"); to maintain domestic tranquility ("She's just a friend"); to avoid social stigma ("I just haven't met the right woman"); for career advancement ("I'm sooo lucky to have a smart boss like you"); to avoid being lonely ("I love opera"); to eliminate a rival ("He has a boyfriend"); to achieve an objective ("But I love you so much"); to defeat an objective ("I'm allergic to latex"); to make an exit ("It's not you, it's me"); to delay the inevitable ("The check is in the mail"); to communicate displeasure ("There's nothing wrong"); to get someone off your back ("I'll call you about lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain

innocence ("There are eight tiny reindeer on the rooftop").

United States v. Alvarez, 638 F.3d 666, 674-75 (9th Cir. 2011) (Kozinski, J., concurring).[11]

The correct standard thus preserves falsity and scienter as distinct inquiries, while recognizing that many of the same facts may be relevant to both. Thus, in a motion to dismiss a § 10(b) complaint challenging an opinion, the first task should be to inquire whether plaintiffs have pleaded specific facts to show subjective falsity. If not, a scienter inquiry is unnecessary. Only if falsity has been adequately pleaded would a court turn to the question of whether plaintiffs had established a "strong inference" that the false opinion had been uttered with an "intent to deceive, manipulate, or defraud" investors, rather than for some other purpose. *See Tellabs*, 551 U.S. at 319, 324.

C. The Same Materiality Standard Applies to Statements of Fact and Opinion.

Finally, a proper application of the subjective falsity standard means that the archaic "puffery" doctrine is no longer necessary to shield honest opinions from liability. Before *Virginia Bankshares*,

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[11] Because all circuits employ some type of recklessness standard, however, scienter could still be found if a speaker gave a false opinion without actually intending to mislead investors, but with severe or deliberate recklessness as to whether or not investors would be misled. Such an inquiry should involve a fact-specific examination of the context of the statement, the speaker's state of mind, and the danger the statement actually posed of misleading investors.

the use of the puffery doctrine was understandable, as courts struggled to find a way to adequately protect statements of opinion. *See* Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 Case W. Res. L. Rev. 143, 160-61, 179-80 (2010) (characterizing puffery as a "safety-valve" doctrine designed to "release the pressure created by frivolous suits"). But the puffery defense is a crude instrument without a sound analytical basis, making it no surprise that it has been applied in a haphazard manner that defies predictability. *See id.* at 159-60 (puffery includes "interpretations of materiality that at times sound like they sprang from the lips of Humpty Dumpty"); O'Hare, *supra*, at 1699 (criticizing the puffery defense for its lack of reasoned analysis).

The puffery defense is also incompatible with the Court's guidance on the question of materiality. The proper materiality analysis does not ask whether a *statement* is material, but rather whether it is false or misleading "as to a material fact." *Basic*, 485 U.S. at 238. Falsity is material if there is "a substantial likelihood" that a "reasonable investor" would view the withheld or misrepresented information as "having significantly altered the 'total mix' of information . . . ." *Id.* at 231-32. This analysis requires examination of the context of the statement and the allegations of falsity, to determine their significance to the reasonable investor under "all the circumstances." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). And it precludes the use of "bright-line"

standards, because "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Basic*, 485 U.S. at 236.

Under this materiality standard, it is inappropriate to apply special rules for statements of opinion—whether by classifying them as "soft" information, or as "puffery." Indeed, the puffery doctrine illustrates the Court's concern that any attempt to employ bright-line rules will be both "overinclusive" and "underinclusive." *Basic*, 485 U.S. at 236. Puffery is overinclusive, and thus overprotective, because it gives investors the troubling message that companies may lie with impunity, as long as they couch their statements in subjective terms. *See* O'Hare, *supra*, at 1715-16, 1725-26 (puffery is based on the doctrine of *caveat emptor*, which is outdated and at odds with the fundamental objectives of the securities laws). At the same time, because it does not apply any consistent standard, puffery is underinclusive, and thus underprotective. Corporate actors are unable to predict whether their opinions will be virtually immunized as puffery, or possibly subjected to liability under a standard that ignores whether they were honestly held. As a result, puffery is not a principled standard of liability on which either companies or investors can depend. *See* Couture, *supra*, at 411 ("A uniform and predictable test is imperative so that corporate actors are not afraid to speak, lest they inadvertently subject themselves to liability.").

Although the puffery defense once served a purpose, it is now unnecessary. A disciplined implementation of the subjective falsity standard would replace the crude implement of puffery with a refined tool that has a firm basis in both logic and law, and which can be applied in a precise and consistent manner. Of course, plaintiffs must still allege that opinions are false or misleading in a *material* respect. And courts may still hold some opinions immaterial before even reaching the question of subjective falsity —including opinions that are akin to the traditional notion of sales "puffery." A proper materiality analysis would arrive at this conclusion after taking into account unique characteristics of each opinion, including its degree of vagueness and the circumstances under which it was conveyed. *See* O'Hare, *supra*, at 1737-40. The key is that courts employ the same fundamental materiality standards for opinions as for any other statement, including examining the context, the allegations of falsity, and the effect on a reasonable investor when considered within the total "mix" of information.

By thus articulating consistent and principled standards for falsity, scienter, and materiality, the Court can achieve the proper balance in the implementation of the securities laws—promoting investor confidence, encouraging open and honest disclosure, and protecting against abusive litigation.

CONCLUSION

For the reasons discussed above, WLF respectfully asks the Court to reverse the Sixth Circuit's decision, and to seize this opportunity to clarify the standards for analyzing statements of opinion under the securities laws.

Respectfully submitted,

DOUGLAS W. GREENE
Counsel of Record
CLAIRE LOEBS DAVIS
KRISTIN BENESKI*
LANE POWELL P.C.
1420 Fifth Ave., Ste 4200
Seattle, WA 98101
(206) 223-6103
greened@lanepowell.com

*Admitted only in Washington

RICHARD A. SAMP
MARKHAM S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302
Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 13-435

In The Supreme Court of the United States

OMNICARE, INC., *ET AL.*,
Petitioners

v.

LABORERS DISTRICT COUNCIL
CONSTRUCTION INDUSTRY PENSION FUND, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE WYOMING RETIREMENT SYSTEM AND THE INDIANA PUBLIC RETIREMENT SYSTEM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JOE KENDALL
KENDALL LAW GROUP, LLP
3232 McKinney Ave., Ste. 700
Dallas, Texas 75204
(214) 744-3000
jkendall@kendalllawgroup.com

Counsel for Amicus Curiae

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

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INTEREST OF *AMICI CURIAE* [1]

Amicus curiae the Wyoming Retirement System ("WRS") was established in 1953 and is administered by an 11-member board that is responsible for retirement benefits for nearly 42,000 active members, 23,000 retirement members and approximately 20,510 inactive members. The active membership is comprised of employees from school districts, the University of Wyoming and community colleges, state and local government and various other political subdivisions. With approximately $7 billion in assets under management, WRS consists of nine separate defined benefit pension plans.

WRS purchased over 90,000 shares of Omnicare stock during the period of the wrongdoing and, as a result of the subsequent disclosure of Omnicare's illegal activities, suffered a substantial loss. It thus has a particular interest in this case and, more generally, in the standards to be applied to statements made by issuers of publicly traded stock.

Amicus curiae the Indiana Public Retirement System ("IPRS") was established by legislation as an independent body, corporate and politic. INPRS manages the retirement assets of seven different retirement funds which includes seven Defined Benefit Plans and one Defined Contribution Plan. INPRS has approximately $27 billion in assets under manage-

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters of the parties, on file with this Court.

ment. It serves the pension needs of 450,000 members and retirees representing more than 1,187 employers including public universities and other municipalities and state agencies.

INPRS purchased over 250,000 shares of Omnicare stock during the period of the wrongdoing and, as a result of the subsequent disclosure of Omnicare's illegal activities, suffered a substantial loss. It thus has a particular interest in this case and, more generally, in the standards to be applied to statements made by issuers of publicly traded stock.

SUMMARY OF ARGUMENT

1. Section 11 of the Securities Act of 1933 provides remedies for untrue or misleading statements in registration statements. 15 U.S.C. § 77k(a). Prefacing a statement with the phrase "we believe" neither adds nor detracts from the truth or falsity of a statement insofar as such belief is implicit in every assertion of fact in any event, and may in fact enhance the misleading quality of a statement where the basis for such belief is omitted and left to be assumed by the listener. *Amici* thus agree with Respondents that even statements of opinion can be misleading if they lack a reasonable basis and false if they imply a reasonable inquiry resulting in a reasonable basis for the claimed opinion.

2. The actual facts of Omnicare's agreements with drug manufacturers and its pharmacy practices, undisclosed at the time of its registration statement and the beliefs professed therein, make it wholly unreasonable to claim that such agreements and practices were legal, regardless of Omnicare's subjective views

on the subject. Omnicare's agreements and conduct regarding drugs manufactured by Johnson & Johnson (J&J) involved express payments for promoting J&J drugs, covert payments later designed to conceal portions of those kickbacks and deny price reductions to the Medicaid program, numerous deceptive efforts to cause doctors to switch prescriptions to drugs more profitable to Omnicare but more expensive or more dangerous to patients and nursing home purchasers, and often outright falsification or prescription records. Omnicare engaged in similar conduct with a wide variety of other manufacturers, in some instances even withholding material facts from its own attorneys in order to get approval for agreements that had already raised significant red flags.

Reviewing even the abbreviated sampling of such facts discussed in this brief amply illustrates that no reasonable inquiry and analysis of those facts could have led to the reasonable conclusion that Omnicare's contracts and practices were lawful. Its promotional and market-share rebate agreements with manufacturers such as J&J fall squarely within the behavior expressly forbidden by the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(1). Its receipt of so-called consulting, data, and educational payments in lieu of such kickbacks, its alteration of prescriptions, and its deception of physicians involve a myriad of false statements to the federal and state governments. And, lest we forget, its conduct risked patient safety by pushing inappropriate drugs for unapproved uses.

Had the actual facts of Omnicare's agreements and conduct been disclosed at the time of its registration

statement, no reasonable investor or analyst would have given any credence to Omnicare's professed belief in the legality of its agreements and practices. Having omitted such material facts, however, Omnicare's statements of "belief" were, at a minimum, misleading, regardless of Omnicare's subjective state of mind or whether Omnicare itself unreasonably believed its own "press." Its statements of belief were likewise false in that they implied a reasonable basis for such belief that the facts demonstrate did not and could not have existed.

Viewed in light of the underlying facts, Omnicare's statements of belief did more than simply describe its subjective state of mind, they misled investors by omission and they implied false facts regarding the basis for such purported beliefs. Omnicare's statements thus are properly subject to, and violate, Section 11 of the '33 Act.

ARGUMENT

I. Statements Regarding an Issuer's Unreasonable Beliefs Are Misleading If They Omit Material Facts and False If They Imply the Further Fact that the Issuer Had a Reasonable Basis for Such Beliefs, Regardless of the Speaker's Subjective State of Mind.

Section 11 of the Securities Act of 1933 provides a private right of action against issuers and other responsible parties who file a registration statement that

> contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

15 U.S.C. § 77k(a).

For defendants other than the issuer, however, the statute provides an affirmative defense to liability if such defendant proves that

> he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading

Id. § 77k(b)(3).

For an issuer, it is no defense under the statute that it believed its statements to be true and had reasonable grounds for such belief. As Respondents correctly point out, at 49-51, allowing an issuer unilaterally to grant itself that defense by adding the words "we believe" to an otherwise actionable statement it would render the statute's expressly limited defense nonsensical. Indeed, *every* factual statement by an issuer necessarily implies that the issuer *believes* the statement to be true, and making that implied belief express adds nothing that materially alters the statement.

Even if this Court were to assume that an issuer's addition of the words "we believe" could somehow diminish the asserted substantive fact to an assertion

regarding the issuer's subjective state of mind, it still makes no sense to excuse the issuer from having performed a "reasonable investigation" and from having a "reasonable ground" to believe the substance of its statement. That bizarre construction of the statute by Petitioners would in fact grant an issuer *broader* protection from liability than given to non-issuers – precisely the opposite outcome than that provided by the expressly limited affirmative defense.

In any event, even assuming an issuer's statement of belief is to be treated differently than a bare statement of the underlying substantive assertion, *Amici* agree with Respondents that statements of opinion or belief can still be false or misleading regardless of the issuer's subjective state of mind. Such statements can often imply additional substantive facts that may be false regardless of defendant's subjective state of mind. Or they can be misleading if a defendant fails to disclose material facts that would allow a listener to evaluate the basis for and degree of uncertainty, doubt, or contraindications regarding such opinion or belief. *See* RESTATEMENT (SECOND) CONTRACTS § 169 cmt. a ("assertion of opinion as to facts not known to the [listener] may, in proper circumstances, reasonably be interpreted to include an assertion as to those facts themselves"); Resp. Br. at 30 (if "the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion," *citing Smith v. Land and House Prop. Corp.*, (C.A. 1884) 28 Ch. D. 7, 15); Resp. Br. at 27 (opinion's potential to mislead may be miti-

gated "by fully disclosing its underlying basis," *citing* RESTATEMENT (SECOND) CONTRACTS § 539(1)).

Misleading statements may often be literally true within the four corners of the statement, but are simply incomplete in a manner that misleads the listener and are actionable under the Securities Act of 1933. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 207-08 (1976). Statements of belief in a fact or condition that is otherwise falsifiable are prime examples of such circumstances. Unlike belief in abstract concepts or principles – "I believe in truth, justice, and the American Way"; "I believe in the Golden Rule" – statements of belief in substantive matters having objective criteria for determination can often be misleading if the basis for such belief is omitted. Telling a parking valet "I believe that is my car" can be misleading if the basis for your belief is that the actual owner owes you money and this is your extra-judicial attempt to collect it. Likewise, telling a police officer "I believe that man stole my wallet" can be misleading if the only reason you so believe is some generalized or specific prejudice against the fellow, a mere hunch, or some similarly flimsy basis.

So too in the legal and financial world, an accountant's statement "I believe this company's books and records comply with GAAP" would be misleading if the basis for that belief was that the President of the Company had an honest face, rather than an actual and diligent examination of the company's books and records. And a lawyer's statement "I believe this contract is lawful" would be misleading if the lawyer failed to disclose case law suggesting just the oppo-

site, but simply thought all of the courts to consider the issue had gotten it wrong.

In this case, Omnicare's professed belief in the legality of its contractual arrangements and practices proved to be shockingly misplaced. Whether it justified such claimed beliefs on wishful thinking, a theory of it's-not-wrong-if-we-don't-get-caught, or even some marvelously subtle legal distinction transforming payments to promote certain drugs into something other than a kickback, what matters here is that it omitted the, at best, thin-to-non-existent basis for its professed beliefs.

II. Omnicare's Omission of Material Facts Regarding Its Illegal Contracts and Practices Made Its Statements of Belief Misleading and False Regarding the Implied Reasonable Basis for Such Beliefs.

As explained in Respondents' opening brief, at 6-9, Omnicare engaged in a scheme of switching patients from less-profitable to more profitable drugs in order to (i) obtain kickbacks from drug manufacturers and (ii) overcharge Medicaid. The Third Amended Complaint (the "Complaint"), the facts of which must be accepted as true at this stage of the litigation, describes various aspects of this scheme. One prominent aspect of the scheme was a contract with Johnson & Johnson (J&J) that paid Omnicare millions of dollars to increase the market share of an antipsychotic medication called Risperdal, which Omnicare accomplished by improperly and dangerously causing the drug to be prescribed to inappropriate elderly patients in long-term care facilities. JA 207-08, 214

(Complaint ¶¶ 55, 67); Resp. Br. at 7-8. This arrangement violated the federal anti-kickback statute, 42 U.S.C. § 1320a-7b(b)(1).

While this scheme was in operation, and in conjunction with its 2005 public offering of $765 million of stock sold to *Amici* and other investors, Omnicare made a number of statements relating to the nature and legality of its business operations that hid the true nature of its illegal activities. Of particular relevance here, Omnicare stated that:

> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.

JA 137. It further stated:

> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.

JA 95-96.

To more fully appreciate how such statements were misleading by omission and false in their implied factual assertion of a reasonable basis for Omnicare's opinions, a brief examination of the underlying illegality is useful.

A. Kickbacks for Promoting Drugs.

The federal anti-kickback statute provides criminal penalties for, in relevant part:

> (1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—
>
> * * *
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program.

42 U.S.C. § 1320a-7b(b)(1).

There is no dispute that Omnicare received cash remuneration from J&J and other companies in the form of rebates, so-called consulting and data fees in lieu of rebates, and other payments for supposed educational activities. There is likewise no dispute that Omnicare arranged for and recommended the purchase of drugs manufactured by J&J and others, for which payment was made in whole or in part under the Medicaid program. And, as is apparent from the facts described below, such payments were "in return for" arranging for and recommending – indeed, aggressively and improperly promoting and manipulating – the purchase of such drugs. *United States* v. *McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000) ("a person who offers or pays remuneration to another person violates the Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals."); *United States* v. *Bay State Ambulance and Hospital Rental Service*, 874 F.2d 20, 30 (1st Cir. 1989) ("The gravamen of Medicare Fraud [under the anti-kickback provisions] is inducement");

United States v. Greber, 760 F.2d 68, 69-72 (3d Cir. 1985) (doctor who owned diagnostic laboratory violated Act because he paid "interpretation fees" to other physicians to induce them to refer Medicare patients to use his laboratory's services); *United States* v. *Shaw*, 106 F. Supp.2d 103, 121 (D. Mass. 2000) (whether a payment is an illegal kickback or a valid discount turns on "whether the reason for offering or accepting the 'discount or other reduction in price' was to induce referrals of or be reimbursed for federal health care program business.").

The Complaint in this case and related federal civil and criminal suits show that Omnicare had in its possession overwhelming facts and information that would have demonstrated to any reasonable issuer or investor that the payments Omnicare received were indeed "in return for" its active promotion of various drugs and hence were illegal kickbacks under the statute.

For example, Omnicare's contracts with J&J between 1997 and 2004, which led to criminal charges against J&J in 2010, provided that Omnicare would endeavor to increase the "market share" of certain J&J drugs in return for "rebates" if Omnicare purchases of those drugs (to fill prescriptions for Omnicare customers) gained market share over competing drugs. The greater the market share of a particular drug relative to Omnicare's total purchases of drugs in the same class, the greater the rebate. JA 206-07 (Complaint ¶¶ 53-54).

The contracts also provided for "performance" rebates and incentives by which Omnicare was paid to actively promote – *i.e.*, recommend and arrange for

the ordering of – particular J&J products. JA 208-09 (Complaint ¶ 56). For an annual payment of 1% to 2% of purchases, Omnicare agreed to implement a so-called "Active Intervention Program (AIP)" or "Appropriate Use Program (AUP)" targeting particular drugs. According to the contracts,

> a) "Active Intervention Program" shall mean a program, applied by Manager and accepted by Supplier 16 in writing, which is designed to appropriately *shift market share* to Supplier's Product. Active interventions can include, but are not limited to, disease management initiatives, written correspondence to Participating Providers prescribing or dispensing pharmaceutical products, educating nursing home staff regarding Supplier's Products, conducting clinical intervention programs though which consultant pharmacists *recommend Supplier's Products* when appropriate.
>
> b) "Appropriate Utilization Program" or "AUP" shall mean a program applied by Manager, and accepted in writing by Supplier, *designed to cause the appropriate use* of Supplier's Product(s).

Id. (quoting contracts) (emphasis added); *see also* JA 209 (Complaint ¶ 57) ("Pursuant to the AIP or AUP, Omnicare and J&J designated certain drugs as 'Selected,' meaning Omnicare and its pharmacy consultants 'favored' those drugs over other brands for certain clinical indications. *Id.* at JNJ001043. * * * Omnicare personnel 'actively participate[d] in educational and promotional programs discussing [the Selected drugs]' and 'work[ed] with [J&J] to implement com-

munication effort to inform attending physicians of ' a drug's 'favored' status. *Id.*").[2]

Both types of rebates and incentives were, on their face, "overt" "remuneration" and "rebate[s]" received "in return for" Omnicare's "purchasing" "ordering" and "arranging for or recommending" the purchase and order of specified drugs paid for under Medicaid. They thus constitute conduct prohibited by the express terms of the anti-kickback statute.

In addition to these "overt" kickbacks, Omnicare received indirect or "covert" kickbacks that were designed as a substitute for the rebates where such rebates might have the effect of altering the "Best Price" under Medicaid rules and hence forcing J&J to provide comparable rebates to Medicaid. JA 210 (Complaint ¶¶ 59-59).

Under the Medicaid Drug Rebate Statute, 42 U.S.C. § 1296r-8, if a pharmaceutical manufacturer provides rebates to a favored purchaser that lower the "Best Price" for a drug paid for by Medicaid, it must inform Medicaid of the new lowest price and give comparable rebates to Medicaid as well. Because the illegal and growing kickbacks to Omnicare began to lower the "Best Price" for certain drugs, J&J and Omnicare agreed to mask such payments by recharacterizing them as, *inter alia*, consulting and data fees. As explained in an internal J&J memo-

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[2] That the programs were couched in terms of "appropriate" use is irrelevant to the anti-kickback statute, which prohibits receiving payment for any recommending or arranging of purchase. And, as will be discussed below, Omnicare's efforts were hardly limited to recommending and arranging the "appropriate" use of favored drugs.

randum describing a new "Consulting Services Agreement" with Omnicare:

> a. Risperdal Rebates have been pushing towards Best Price
>
> b. To avoid Best Price, the Strategic Overlay for Risperdal (2% of sales) had to be eliminated
>
> c. In order to balance this, an agreement was established with Omnicare to purchase data, roughly at the cost of the Strategic Overlay for Risperdal.

JA 212 (Complaint ¶ 61) (quoting Ex. 26).

Omnicare and J&J entered into a similar arrangement concerning payments to promote the drug Sporanox. A 2002 e-mail from J&J noted that because

> the 25% rebate on Omnicare Sporanox purchases sets the best price, and the next best price is 20%, the Medicaid cost impact is about $1 million per year (avg $200k per % point) for the additional 5%. It may make sense for us approach Omnicare about reducing the rebate to 20%.
>
> * * *
>
> I would recommend to try to make up the loss of rebates in another way. Ex. 28 at JNJ347031-32.

JA 213 (Complaint ¶ 64).

These various alternative forms of kickback amounted to millions of dollars paid by J&J to Omnicare. JA 212, 214 (Complaint ¶¶ 62, 65).

Once again, these payments, made expressly "to balance" and "make up for" the express kickbacks and rebates that J&J wished to hide from Medicaid, violated the express terms of the anti-kickback statute.

Rather than acting as a neutral intermediary between doctors and drug manufacturers, Omnicare instead became the marketing arm of J&J and others in return for millions of dollars in kickbacks. As an internal J&J memo noted, "Omnicare, Inc. has demonstrated its ability to partner in a true sense of the word and has generated well over 100 million dollars of Johnson & Johnson pharmaceuticals annually." JA 219 (Complaint ¶ 74) (quoting Ex. 37). J&J executives recognized the power Omnicare wielded as a faux-intermediary, noting that Omnicare's success in causing physicians to switch to the drugs it was being paid to promote was "Incredible: good for us but scary on the power to do this." JA 220 (Complaint ¶76) (quoting Ex. 38). Accordingly, J&J correctly viewed Omnicare as an "Extension of [the J&J] Sales Force," *id.* (quoting Ex. 39), which is precisely the role Omnicare was being paid for and precisely what the anti-kickback statute means when referring to being paid "in return for" arranging or recommending the sale of a product.

While J&J was Omnicare's largest patron, providing Omnicare with tens of millions of dollars in payments, Omnicare had similar agreements with many other companies as well. Such companies included many of the largest names in the pharmaceutical industry, including Abbott Laboratories, AstraZeneca Pharmaceuticals, Bayer Corporation, Eli Lily & Co., Merck & Co., Inc., Novartis, Novo Nordisk, Pharma-

cia, and Ivax Pharmaceuticals, Inc. JA 221-26 (Complaint ¶¶ 79-90).

Any suggestion by Omnicare that these agreements merely provided for normal or legal discounts is fanciful. As the United States noted in another case in response to such claims, while ordinary price reductions or discounts may qualify for a safe-harbor under 42 U.S.C. § 1320a-7b(b)(3)(A), payments "to pharmacies for switching patients from one drug to another, and for other efforts to increase a drug's utilization do not qualify as protected price reductions simply because the payments are labeled as 'rebates' or 'discounts.'" Statement of Interest on Behalf of the United States of America in Response to Defendants' Motions to Dismiss the Complaint, *United States* ex rel. *Banigan & Templin, et al.* v. *Organon USA Inc., Omnicare, inc. and Pharmacia, Inc.*, No. 07-12153-RWZ, Doc. 144 (9/30/2011), at 5. The central issue is "'is whether the reason for offering or accepting the "discount or other reduction in price" was to induce referrals of or be reimbursed for federal health care business.'" *Id.* (quoting *Shaw*, 106 F. Supp.2d at 121). As the facts here and in the separate *Organon* case illustrate, the payments to Omnicare

> were not mere price reductions because [the manufacturer] allegedly conditioned the payments on Omnicare * * * not only purchasing its products, but also engaging in "therapeutic interchange programs" or switching efforts to promote utilization of [the manufacturer's] drugs at the nursing facilities where Omnicare * * * filled prescriptions. As such, the payments were not true price discounts, but ra-

> ther were remuneration that [the manufacturer] offered and paid to induce Omnicare * * * to recommend its products.

Id. at 6. In short, while across-the-board discounts are permissible, conditioning such discounts on recommending or ordering certain amounts or market shares of the manufacturer's products converts them into illegal kickbacks.[3]

B. False Statements and Illegal Overcharge of Medicaid.

Omnicare's pharmacy practices likewise demonstrated that it was acting aggressively to arrange for and recommend the purchase and ordering of specific prescription drugs that were the subject of the agreements for the payments it received. And often its practices in pushing favored drugs were illegal independent of whether they were the result of the kickbacks.

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[3] Nor could the market-share rebates plausibly be viewed as volume discounts, which, by themselves, could be legal. Omnicare's market-share bonus payments were not in fact tied to volume, but rather to market percentage relative to competing drugs. Thus, had Omnicare doubled its customer base and hence bought twice as many drugs in the same market proportions, it would not have received a market-share rebate despite the vastly increased volume of purchases. Likewise, doubling sales without implementing an AIP/AUP to promote J&J products would not have provided Omnicare with a performance rebate. Conversely, if Omnicare simply ceased buying competing products but kept its purchases of J&J products the same, it would have indeed increased market share and obtained a rebate despite no increase in volume. To pretend these contractual arrangements are akin to volume discounts is simply not credible.

For example, Omnicare deceived physicians with regard to the efficacy and cost effectiveness of drugs in order to convince them to change their prescriptions to a drug that Omnicare was being paid to promote. JA 198 (Complaint ¶¶ 37-38). It did so by manufacturing false clinical case studies that purported to show cost greater cost effectiveness for a favored drug over a competitor's drug and by using such false comparisons to obtain blanket authorization to substitute the favored drug for the competing drug. *Id.*

Omnicare also engaged in various other means of promoting and recommending J&J drugs in order to increase market share and hence increase its kickbacks. With the J&J antibiotic Levaquin, for example, Omnicare began a lobbying effort to persuade physicians to switch away from the typically prescribed antibiotic Cipro to the less prescribed Levaquin. JA 217 (Complaint ¶ 72). It did so, in part, by seeking pre-authorization for a change in antibiotics and, when it did not receive such authorization would call physicians to persuade them to allow the substitution of Levaquin when it received a prescription for Cipro. Again, the driving force behind such efforts was Omnicare's agreement with J&J to actively favor Levaquin over Cipro and the payments Omnicare received for such promotion and for increasing market share. *Id.*

Omnicare's actions also resulted in one of the primary evils the anti-kickback statute was intended to eliminate: distorting medical decisions in the service of profit-maximization. Because Omnicare received payments in return for increasing the market share

of particular drugs, it engaged in various efforts to increase the use of such drugs notwithstanding their inappropriateness for many patients. Risperdal is a prime example of such behavior. Risperdal is an atypical antipsychotic that has only been approved for the treatment of schizophrenia. But few patients in the Long Term Care Facilities with which Omnicare had contracts in fact had schizophrenia. Many of them, however, had dementia and various dementia-related behavioral issues. Because J&J's payments to Omnicare turned in part on successful promotion of Risperdal, Omnicare thus began to promote Risperdal for the treatment of those conditions and behaviors, even though it was not approved for such use, had been shown to increase the risks of strokes and other cerebrovascular incidents, and had resulted in fatalities among dementia patients. JA 215 (Complaint ¶ 69).

Omnicare also broke a variety of laws in connection with its systematic effort to distribute a more expensive form of the drug Ranitidine (the generic form of Zantac). While traditionally prescribed in tablet form and often subject to state price caps for Medicaid reimbursement, the capsule form – considered a different drug used in certain unusual situations – often is not subject to the same price caps. The capsule form thus can be many times more expensive despite no therapeutic advantage in ordinary cases.

In order to profit from such price discrepancy, Omnicare caused prescriptions to be altered to make it appear that the physician had ordered the capsule rather than the tablet. It did so in various and illegal

ways, including by modifying its staff's computers to make it impossible for its clerical staff to even enter an order for the tablet, by having the clerical staff physically alter physician orders to make it appear they had ordered the capsule rather than the tablet, and misleading doctors into signing post-hoc approval by having them sign altered confirmations without noting the alteration. JA 199-201 (Complaint ¶¶ 40-45). Internal documents made clear that the sole purpose of the changes was to avoid the price limits on the tablets and not for any therapeutic benefit. JA 194-99 (Complaint ¶¶ 31-38) (describing how clinical initiatives and drug-switching efforts were based on internal reports regarding profitability to Omnicare of particular drugs rather than their value to patients or purchasers). Indeed, when pricing conditions changed, Omnicare would direct its pharmacists to switch back to the tablet if that was more profitable, again without physician approval for the further switch. JA 201 (Complaint ¶ 44).

C. Omnicare's Undisclosed Illegal Conduct Rendered Its Statements of Belief Misleading and Its Implied Statement of a Reasonable Basis for Its Professed Beliefs False.

In light of all these self-evidently material facts, none of which were made available to investors reading the registration statement, Omnicare's asserted belief that its contracts with manufacturers and its pharmacy practices were "legally and economically valid arrangements" or "in compliance with applicable federal and state laws," JA 137; JA 95-96, was, at a minimum, misleading and falsely implied a reason-

able basis for such a belief and the absence of known facts tending to contradict Omnicare's belief.

Indeed, having expressly told investors of the existence of the anti-kickback statute and other limits on the manner in which Omnicare could legally operate its business, JA 136-37 (Complaint ¶ 46), Omnicare's omission of material facts regarding its drug-promotion agreements and drug-switching activities was necessarily misleading and necessarily implied that Omnicare had conducted a reasonable inquiry into the very issue it had highlighted.

Had Omnicare said more, and provided the underlying facts regarding its agreements and practices, investors might have been able to evaluate the reasonableness of Omnicare's stated beliefs for themselves. For example, if Omnicare had disclosed the content of its drug promotion contracts in conjunction with its statements regarding their legality, investors or analysts could have seen for themselves whether the payments were indeed in exchange for Omnicare's drug promotion initiatives. They would have quickly concluded that they were indeed kickbacks and, at a minimum doubted Omnicare's judgment and the degree of risk involved to Omnicare's earnings, even had they assumed the genuineness of Omnicare's stated beliefs.

In fact, in at least one instance that we know of, Omnicare did show one of its agreements to an attorney who concluded that "the proposed arrangement, on its face, has all the characteristics of a kickback." JA 225 (Complaint ¶ 89) (quoting attorney memorandum discussing proposed agreement with Ivax Pharmaceuticals, Inc.). Omnicare had reached an agree-

ment with Ivax in 1999 whereby it was paid an $8 million signing bonus and a 5% post-purchase rebate in exchange for committing to buy $50 million worth of certain generic drugs produced by Ivax. The attorney reviewing the agreement found it problematic on its face, specifically warned that the "lump-sum cash payment (the stated 'signing bonus') intended as an incentive to win Omnicare's business" created a "*heightened* risk" that it would be seen as violating the anti-kickback statute. *Id.*

Rather than take the advice it had received and decline to enter into an illegal agreement, Omnicare instead sought the opinion of a different attorney, conveniently failing to advise the attorney of the signing bonus and the fact that it would be received in advance of any purchases. JA 225-26 (Complaint ¶ 90). Having withheld such material information, Omnicare received a green light from the new attorney and proceeded with the agreement. *Id.*

Not only do the different results illustrate the materiality of the information Omnicare withheld from the second attorney (and, of course, from investors), it also illustrates how a claimed belief in the legality of an agreement that omits the facts and reasoning underlying that belief can be deeply misleading. No interested listener with access to all the material facts would have given any significant weight to Omnicare's beliefs, whether genuine or not.

Similarly, any reasonable observer who was aware of Omnicare's systematic alteration of prescriptions without consent would have understood that such changes constituted false claims for reimbursement of medications not actually prescribed by the doctor and

violated a host of laws regarding medical practices. Certainly any investor or analyst apprised of such conduct would have had serious qualms about any claim that Omnicare was complying with applicable state and federal laws, regardless whether Omnicare genuinely (but absurdly) believed that it was.

The legal fallout from the eventual disclosure of Omnicare's agreements and practices likewise confirms that Omnicare's claimed beliefs lacked a reasonable basis and were misleading for having omitted numerous material facts that contradicted the substance of those claimed beliefs. For example, when the details of Omnicare's agreements and practices were brought to light by various whistle-blowers, Omnicare, J&J, and others were faced with a host of lawsuits charging that such agreements and practices violated the anti-kickback statute, the False Claims Act, and other laws. Resp. Br. at 12-13. In the cold light of day, the facts of these cases were far less comforting than Omnicare's sanguine prior assurances to investors regarding the legality of its conduct. Indeed, forced to examine its conduct with actual due diligence and candor, Omnicare itself apparently lacked the comfort it had previously expressed to investors and accordingly settled many of the cases against it for over $300 million and counting.[4] That

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[4] *See* Resp. Br. at 13 (describing various settlements by Omnicare of $98 million plus interest, $49.5 million, and $49.0 million to the United States and various States); Barrett J. Brunsman, *Omnicare Agrees to $16.7 Million Settlement Over Kickbacks*, Cincinnati Business Courier, August 16, 2013, http://www.bizjournals.com/cincinnati/news/2013/08/16/omnicare-agrees-to-167-million.html?page=all (last visited Sept. 1, 2014); *Omnicare Reports Third Quarter 2013 Financial Results*,

the eventual disclosure of the facts of Omnicare's agreements and practices led to such massive payments seems more than sufficient to demonstrate their materiality. And it likewise demonstrates that the omission of such powerful facts rendered Omnicare's claimed belief in the legality of its agreements and practices, at a minimum, profoundly misleading.

Having in its registration statement omitted the material facts that subsequently came to light, and having allowed a critical information imbalance to exist, Omnicare's statement of belief necessarily created a false sense of security in investors who were mislead into believing that Omnicare's professed belief had a reasonable factual and legal basis. The misleading quality of Omnicare's statements has nothing to do with Omnicare's subjective state of mind, but rather its likely (and eminently predictable) effect on and interpretation by investors.

For similar reasons, Omnicare's statement of belief implied the further fact that it had indeed come to those beliefs based on a reasonable inquiry into the facts and the law regarding its kickback contracts and drug-switching practices and that the company was not aware of any material facts that contradicted the stated beliefs. Based on the facts described above and the allegations of the Complaint, those implied

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at 3-4, 10 n. (a)(1), http://www.sec.gov/Archives/edgar/data/353230/000035323013000061/ocrerex991q32013.htm (last visited Sept. 1, 2014) (disclosing $120 million settlement in *United States ex rel. Gale v. Omnicare*, No. 1:10-cv-00127); DOJ Press Release, *Omnicare to Pay Government $4.19 Million to Resolve False Claims Act Allegations of Kickbacks* (Feb. 27, 2014), http://www.justice.gov/opa/pr/2014/February/14-civ-216.html (last visited Sept. 1, 2014).

factual statements were necessarily false in that no reasonable factual and legal inquiry could have reasonably concluded that such conduct was legal. Even if one were to assume that Omnicare indeed held an actual belief in the legality of its conduct, it does not change the fact that such belief is simply unreasonable. And it does not alter the falsity of the implied factual assertions that its beliefs were reasonable and based upon reasonable inquiry and analysis.

Under such circumstances, investors would have assumed that Omnicare's stated belief about an important matter such as the legality of its business practices would be held only based on reasonable due diligence into the facts and law that would indeed support such a belief in a reasonable person. Given that investors would recognize the threat of severe penalties for violating the law and the superior knowledge of Omnicare and its executives, Omnicare certainly should and would have expected such an investor response to its professed beliefs. Indeed, the only point of Omnicare making its statement of belief at all is to lead investors precisely to that conclusion and to give them comfort in their decision to purchase stock. Unfortunately, such intended comfort, while effective, proved false and misleading. Section 11 of the '33 Act is the appropriate remedy in such a case.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Sixth Circuit in favor of Respondents and remand for further proceedings.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

JOE KENDALL
KENDALL LAW GROUP, LLP
3232 McKinney Ave., Ste. 700
Dallas, Texas 75204
(214) 744-3000
jkendall@kendalllawgroup.com

Counsel for Amici Curiae

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